83 - 1802

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

CHARLES L. DANIEL, et al.,
Petitioners,

vs.

RUSH PETTWAY, et al.,
Respondents,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Respondent,

AMERICAN CAST IRON PIPE COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in failing to enforce the mandate of *Pettway v. American Cast Iron Pipe Company*, 576 F.2d. 1157 (5th Cir. 1978), *cer. denied*, 439 U.S. 1115 (1979) and *Pettway v. American Cast Iron Pipe Company*, 494 F.2d. 211 (5th Cir. 1974) and in sanctioning a consent settlement approved by the district court which contained no "opt out" provisions as mandated in the cases enumerated above?

2. Should the supervisory power of the court below have been invoked to enfoce the "opt out" procedures outlined by the Fifth Circuit to assure class members due process of law?

3. Did the District Court err in advising the objectors to the proposed consent decree to consult with Attorney Wiggins, the class attorney on objections to the proposed decree and his conduct in consulting with the attorney for the defendant on how to meet these objections and did this action constitute a sell-out, compromise or collusion to such an extent the court should have provided separate counsel and created a sub-class for the protection of this definable minority?

4. Were the petitioners denied even minimum due process of law by the District Court's failure to insist that the proponents of the settlement offer any proper witnesses and any testimony, especially expert testimony, as to the economic factors considered in finding the settlement to be fair, just, and reasonable thereby denying the objectors any right to confront witnesses or to conduct cross-examination, with the result being that the burden of proving the settlement to be unfair, unjust and unreasonable being improperly shifted to the objectors, also in violation of due process of law?

5. Did the District Court deny the objecting class members due process of law by improperly shifting the burden of proof to the objecting class members and improperly considering as evidence economic facts proffered by the class attorney denying a right of cross-examination to petitioners?

LIST OF PARTIES

The parties in the court below were Charles L. Daniel, et al.[1], Rush Pettway, et al.[2], Equal Employment Opportunity[3], and American Cast Iron Pipe Company[4].

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[1] Charles L. Daniels; Lewis Spratt, Sr.; Henry Goodgame; Henry Arnold, Jr.; James Barnes; Elijah Brown; Willie Brundidge; Mose Bunch; Robert Caldwell; William Caldwell; Robert Cannon; Melvin Carson; Rosie Catlin; Willie Curry; Ed Dancy, Jr.; Carl Edwards; Leon Elliott; Randolph Ellis; Fitchue Anderson; Willie Harper; Hattie Hopkins; Nathaniel Howard; Eddie Huggins; Johnnie Hughes; Fred Jemison; Rufus Johnson; Laura Kimbrough; Hubert Moore; Henry O'Neal; Theodore Peoples; Willie Perdue; William Pollard; Booker T. Powell; David Powers; Earnest Rich; Lemmie Ruffin; William Spencer; Estelle Allen; Joe Steel, Jr.; Zonnie Stuckey; Andrew Thomas; Melvin Turner; Eugene Williams; Raymond Williams Jerry Zorns; Erwin Callens, Sr., Willie Blue; Henry Rice; S. W. King, Jr.; Earl Murray; Jim Amison, Jr.; Peter J. Wrenn*; Benjamin Shorter; Melvin Brown; Melvin C. Story; M. L. Walls; Calvin C. Johnson; John Jenkins; Thomas M. Phillips; Bruce Square ..... Plaintiff-Appellants

*Named plaintiff in 1966.

[2] Rush Pettway, David Jordan, Alex Fitts, and the class of black employees of the American Cast Iron Pipe Company ..... Respondents.

[3] American Cast Iron Pipe Company ..... Respondent.

[4] Equal Employment Opportunity Commission ..... Intervenor.

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TO THE HONORABLE, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Charles L. Daniel, et al., respectfully pray that a writ of certiorari be issued out of and under the seal of this court to review the judgment of the United States Court of Appeals for the Eleventh Circuit rendered on the 21st day of November, 1983, which judgment affirmed the District Court Decision that the Respondent's consent settlement was fair, reasonable and adequate.

The timely application for rehearing in the United States Court of Appeals for the Eleventh Circuit was denied without an opinion on the 29th day of January, 1984.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit has been reported at 721 F.2d 315, and is attached hereto in Appendix A, infra, pp. A-36 - A-39.

The previous opinion of the Trial Court, the United States District Court of the Northern District of Alabama, Judge Seybourn H. Lynne has not been officially reported but is attached hereto in Appendix A, infra, pp. A-3 - A-35.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on the 21st day of November, 1983, and is annexed hereto in Appendix A, infra, pp. A-1 - A-2.

A timely petition for rehearing was denied on the 30th day of January, 1984, and the judgment of the United States Court of Appeals for the Eleventh Circuit thereon is attached hereto in Appendix A, infra, pp. A-40.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the United States Court of Appeals of the Eleventh Circuit rendered the 30th Day of January, 1984, is 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTE INVOLVED

The statutory provision involved in this proceeding is 42 U.S.C. § 2000e-5(g) which provides as follows:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful

employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, therby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Actions to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this

subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the

opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

This is the sixth appeal of this case before the Eleventh Circuit and its predecessor, the Court of Appeals for the Fifth Circuit. The history of the litigation is fully stated in its last previous appearance, *Pettway, et al. v. American Cast Iron Pipe Co.*, 681 F.2d 1259 (11th Cir. 1982). Originally the trial court found the existence of racial discrimination in the employment and promotion practices of the defendant. The court granted an injunction and then declined to find any damages in favor of the plaintiff class. Upon appeal, the Fifth Circuit Court of Appeals remanded for a determination of back pay, 494 F.2d 211, leaving open, of course, the possibility of a settlement between the parties. Such a proposed settlement was recommended by the class representatives and their counsel, in a sum amounting to approximately $1,000,000.

There were objections and an appeal to the Fifth Circuit Court of Appeals who disapproved the consent settlement and stated

> we further hold that on remand the district court must provide those claimants who decide to opt-out of the settlement with an opportunity to assert their individual claims in this action. *Pettway IV*, 576 F.2d at 1220. Such claimants must be permitted to exclude themselves from the class and must be given an opportunity to prove entitlement to a larger individual award in the same court that hears the claims of the class. 706 F.2d 1220 (1978)

A substantial number of the members of the class had accepted checks mailed out by the defendant in accordance with the proposed settlement. The court in Pettway IV further opined:

> Of course, each of the 399 awardees who opted into the settlement should be provided notice of their right to disaffirm their award and participate in further back pay proceedings. This notice should fully explain the awardee's rights and the proper procedures for exercising them.

After Pettway IV the district court and parties proceeded to settle the injunctive aspect of the action and in attempting to

settle the back pay aspect ordered in 1971 were unable to agree. The defendant desired to make an offer of judgment to members of the class, and the court appointed a special master where the individual had to establish his entitlement. The class appealed and the Eleventh Circuit in *Pettway v. American Cast Iron Pipe Company*, 681 Fed.2d 1259 (1982) (certiorari pending) reversed the district court and ordered settlement on a classwide basis.

On remand the parties shortly thereafter arrived at a tentative settlement and began meeting and notifying the class of the proposed classwide settlement for $3,983,401.91 in satisfaction of all racial discrimination. The consent settlement and notice did not provide an "opt out" provision as mandated in Pettway IV supra nor had the court and parties provided the 399 a right to disaffirm their award and participate in further back pay proceedings (these were meted out $500 each without regard to the amount of discrimination.)

The objectors appealed the district court's finding that the consent decree was fair, adequate and reasonable. The Eleventh Circuit addressed none of the issues presented but after a history of the case summed up appellant's argument as follows, "they did not receive amounts in the proposed distribution equal to comparable members of the class." The parties in their notice to members of the class advised any person who might object as follows:

> The attorney representing the class is available to assist you . . . He will also assist any member of those who objects to the settlement by providing advice on the proper procedure to follow in presenting such objections.

The 110 objectors filed their objections but contrary to the intent of the notice, Robert L. Wiggins, Jr., attorney for the class according to his accounting to the court (R. 146) was meeting with Acipco's attorney, Pat Logan, to "sell out" those who objected. On April 22, 1983, the class attorney "reviewed the status of objection at the courthouse; talked to Logan, April 26, 1983. Review objections and draft joint motion to require disclosure of facts by objectors, draft letter to Logan summarizing objections by categories—5 page letters to April 27,

1983 . . . *prepare and meet with Pat Logan on approach to objections.*" (emphasis supplied) (R. 146)

The objectors had requested the court to allow separate counsel, but the court had taken no action on the several requests and advised the objectors that it would award no fees to the attorney for objectors. The constitutional guarantee of due process of representation had not only been breached but their counsel, contrary to ethics, as well as our adversary system was plotting with the defendant against their interest. The court may not have been aware of this at the time of its occurrence. Attorney Wiggins filed his supplemental affidavit with the court showing the misconduct on June 23, 1983, on the same day the court issued and approved his finding of facts and his actions against members of the class in conjunction with their adversary were set forth in his affidavit was commended and he was compensated an additional $50,000.00.

Your petitioners would be remiss in not taking issue with the court's finding of fact and conclusion of law. The district court judge included many facts which were not of record at the fairness hearing nor the subject of any judicial scrutiny i.e. meetings held at church, votes of the individual members at meetings and conclusions drawn therefrom. On one occasion in the appendix he notes that an objector was either absent or not listening at one of the class meetings several weeks earlier. The court was also privy to many of the meetings with the class attorney and the class at the attorney's office or, at least, his facts indicate as much. The court also in its conclusion takes liberties statistically to minimize the petition of those filing objections. The class initially contined some twenty-two hundred (2,200) and had been reduced to eight hundred and thirty three (833) who would participate in bck pay award. The court finding of fact that less than *five per cent* objected when in the record page 4, the court noted "some hundred ten (110) objections have been received." The court also, contrary to presumptions under the law, assumed that all who did not object were in accord and agreement with the whole settlement.

The court fails to note negative factors in its finding i.e. that the E.E.O.C. failed to sign the agreement nor signifying accord as to

its adequacy or fairness. The court also fails to note that no member of the class or class representative testified in favor of the proposed consent settlement. Joe Marbury, a representative of the class Committee for Equal Job Opportunity testified in opposition to the settlement, the way it was negotiated and presented to the class and the manner in which awards were granted i.e. one man was given ten thousand dollars ($10,000) for praying. There were ten witnesses who testified and the court after an initial statement in opening recessed until 1:30 and adjourned at 4:25 p.m. Although the court in its record of fact implies that objectors were provided ample time stated that he wanted the matter brought to a close and advising "you've got ten more minutes". (F.H. 95)

The purported computer print outs on which the court relies to substantiate the heresay affidavits which were never received were examined by your writer and the material contains no conclusions nor calculations only parties' names, race and job class. Mr. Wiggins advised your writer that there had been no written opinion arrived at and recieved by the "expert" who was to receive $175,000. The court was advised that the computer printouts had not been furnished as requested and the expert proffered by the objectors was brushed aside by the court.

The class representatives were not representative of all the class members. The Committee for Equal Job Opportunity (C.E.J.E.) removed all (being part of the 399) who cashed their checks in 1975 from the committee although they were some of the original members of the committee when it numbered less than ten.

The Equal Employment Opportunity Commission (E.E.O.C.) was a party to the action having appealed to the Eleventh Circuit in 1982 to reverse the trial court for deleting them from the case. *Pettway v. American Cast Iron Pipe Company*, 681 F.2d 1269 (11th Cir. 1982). The E.E.O.C. was not a party to the consent settlement nor a signator but after an appeal noted that the settlement appeared on its face to be fair. This was noted by the Eleventh Circuit in its opinion at page 316.

In the fairness hearing the defendant offered no evidence only

affidavits which were objected to by petitioner as to the proposed settlement being fair, reasonable and adequate. No ruling was made as to the reception of this offer by the trial judge and this was included in the record on appeal by supplementing the record.

The parties gave notice to the class of its proposed settlement and attached form objection to be filed by persons having objection. Objectors were advised to see the class attorney Wiggins since 110 objections were filed. Prior to the fairness hearing while he was obliged by notice to meet with the objectors Attorney Wiggins was meeting and conferring with the attorney for the defendant Pat Logan on "approach to objection." As early as February 24, 1983, the class attorney noted "dissention in class and distribution formula." The court noted the possible conflicts within the class but took no steps to create a subclass or enter an order allowing the objectors to "opt out" of the proposed settlement.

The Court of Appeals had mandated that the court provide an "opt out" right to persons who might disagree with any future settlements and also that as to the persons who cashed their checks in 1975. The court ordered established a procedure whereby they might repay the money or place security for monies received in the 1975 settlement offer thus allowing them to "opt in" the class. No procedure was established by the court although the defendant had made a motion for repayment of the money or posting pursuant to the mandate. These provisions were inferentially approved by the Supreme Court in its denial of certiorari.

The court on May 12, 1983, issued its final judgment that the consent decree was fair, reasonab' ar.d adequate. A Motion for Rehearing was filed on May 23, 1983 and the court at the time of rendering its finding of fact and conclusion of law on June 23, 1983, overruled the Motion for Rehearing. Notice of appeal was filed by the objectors, Charles L. Daniel and Estelle Allen on July 22, 1983 and the cases were consolidated on appeal. The objectors appealed to the Eleventh Circuit and on November 21, 1983, the Eleventh Circuit Court of Appeals in its opinion at 721 F.2d 315 (11th Cir. 1983) upheld the trial court's ruling and found the consent settlement was "fair and reasonable." The appellants moved for an en banc rehearing which was denied on January 29, 30 1984 (Appendix, pp. A-40), and appellants petition at this time for certiorari to the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

ISSUE I

Whether the district courts approval of the consent settlement notice and the conduct of the class representative, class counsel and court so abridged the objector's rights of due process and to render the same collusive and cause the "fairness hearing" to amount to "boiler plate" approval of an inadequate award and a 'sell out" of a large definable minority, departing to such an extent that the supervisory powers of this court be invoked by certiorari to define the accepted and usual course of judicial proceeding.

The fairness hearing conducted and noticed by the district court provided no "opt out" procedure for the class objectors which the court in *Pettway v. American Cast Iron Pipe Company* (Pettway IV) referred to as "subclass members" noting the class was divided. The total receiving awards were less than 800, the number noted in Pettway IV was 399. The notice itself advised any objector he would be subject to cross-examination on the fairness hearing. The class objectors were advised to see Mr. Wiggins, the class attorney. After objections had been filed this same attorney Wiggins met and talked with defendant ACIPCO's counsel Logan summarizing the objector and ultimately "meet with Pat Logan on approach to objection. 10.9 hours." (pp. A-42)

At the hearing the court allowed the class representative and defendant to offer affidavit of economic data to substantiate that the proposed settlement was fair, reasonable and adequate. The class attorney filed his own affidavit as to the settlement being fair, reasonable and adequate although the proposed settlement approved a fee of $175,000 to the expert. There have been several attempts to arrive at consent settlements and how to treat the competing of the members of the case.

"Although settlement is the preferred method of resolving Title VII suits, the class action settlement process is "more susceptible than adversarial adjudications to certain types of abuse." *Pettway vs. American Cast Iron Pipe Co.*, 576 Fed. 2nd 1157, 1169 (5th Cir. 1978) (Pettway IV). Federal Rule of Civil

Procedure 23(c) mandates judicial approval of all class action settlements and that requirement is manifested in both substantive and procedural protections afforded to absent class members . . ." the law accords special protections, primarily procedural in nature to *individuals* class members whose interests may be compromised in the settlement process "Pettway IV 576 Fed. 2nd 1326, 1330 (5th Cir. 1977). The fact that appellant objectors were denied both procedural and thereby substantive protection previously guaranteed by the Court of Appeals is the basis for this writ of certiorari.

Holmes vs. Continental Can reaffirms that appellate courts: "must have a basis for judging the exercise of the district judge's discretion." *Cotton vs. Hinton*, supra., the proponents of class action settlements bear the burden of developing a *record* demonstrating that the settlement distribution in fair, reasonable, and adequate. *Grunin vs. International House of Pancakes*, 513 F. 2d 114, 123 (8th Cir.) cert. denied 423 U.S. 864, 965 Ct. 124, 46 L.Ed. 2d 93 (1975).

The *Holmes* case also notes that when a settlement explicitly provides for preferential treatment for the named plaintiffs in a class action, a substantial burden falls upon the proponents of the settlement to demonstrate and document its fairness. The Court of Appeals noted the similarity to Pettway IV 576 F. 2d at 1217 where the court ruled on a prior dispute in the allocation of a settlement fund. "The court should not allow a majority, no matter how large, to impose its decision on the minority . . . Objection by a few dissatisfied class members should trigger close judicial scrutiny to ensure that the burden of settlement is not shifted arbitrarily to a small grou· of class members." *Plummer vs. Chemical Bank*, 668 F. 2d 654 (2nd Cir. 1982) states that "such disparities must be regarded as prima facie evidence that the settlement is unfair to the class, and a heavy burden falls on those who seek approval of such a settlement."

The proponents of the settlement in this case have clearly failed to carry their heavy burden to overcome objectors prima facie case. There was simply no evidence offered at the hearing in support of the settlement. The only evidence offered in support of the settlement were affidavits of Plaintiff's attorney Robert

Wiggins, Jr. et al. explaining reasons why in his opinion the settlement was fair, just, and reasonable and explaining his expert's calculations (F.H. 5, 6) and affidavits of the proposed experts of the defendants. Plaintiff's objectors properly objected to this injection of hearsay testimony. The district court's continuing failure to rule on this objection and failure to admit the same gave no basis for its use and was error sufficient for reversal, and should have in fact resulted in reversal. With no ruling whatsoever, objectors were denied due process in that they had no way of knowing what evidence was being considered in support of the settlement, and were denied the opportunity to intelligently contest such evidence in the best possible manner i.e. by cross examination that is by confronting the witness and discovering the basis of their opinion.

In *Holmes vs. Continental Can Co.*, at 1148 the Court of Appeals, 11th Circuit, notes that they limit their inquiry to the record of the fairness hearing. Any advocate or party relying on this standard of review would expect substantial evidence to be produced at such a hearing. As in Pettway IV, the fundamental problem facing us in our task today is the absence of an adequately developed factual record "576 F. 2d at 1183. *Holmes vs. Continental Can. Co.*, at 1150. The fact that numerous materials were considered in judges's chambers both before and after the hearing does not provide an adequate record for review. Such procedure heightens the impression that the fairness hearing is a mere rubber stamping used to ram a settlement down the throats of unwilling objectors., *Holmes vs. Continental Can. Co.* 706 at 1150.

Even if the affidavits were in the mind of the court entered in the open court in the fairness hearing, since these were the only evidence offered by proponents, reversal should follow. "Findings and conclusions should be made with respect to every controverted settlement. Moreover, those findings and conclusions should not be based simply on the arguments and recommendations of counsel," *Plummer vs. Chemical Bank*, 668 F. 2d 654, 659 (2nd Cir. 1982) quoting Pettway IV, 576 F. 2d at 1169. Further "when the district court approves a settlement which is not based upon well reasoned conclusions arrived at

after a comprehensive consideration of all relevant factors" its decision will not survive appellate review." Under its prior analysis in Pettway IV, the court should not have allowed this decision to survive appellate review.

As the Plummer case again quotes Pettway IV 576 at 1169, "The interest and of lawyer and class may diverge, as *may the interests of different class members* and certain interests may be wrongfully compromised, betrayed, and *sold out* without drawing the attention of the court." Such a sell-out is signalled here where there is simply no evidentiary foundation in support of the proposed settlement, except the erroneous reliance on counsel's opinion. Reliance on counsel's opinion tends to render the district court captive to the attorney and fosters rubber stamping by the court rather than the careful scrutiny which is essential for judicial approval. Even though statistics are competent evidence, they should not be so when they are "incomplete data." *United States vs. City of Miami, Fla.*, 614 F. 2d 1322 at 1352.

Certainly we did not expect the district judge to convert the fairness hearing into a full-blown trial on the merits. However, class action settlements should accept affidavits as evidence only after careful scrutiny. There was no such careful scrutiny in the case before us. At any rate, the affidavits were never properly introduced, and cannot be considered as evidence. Nor should the objectors have been under any burden to cross examine a witness, such as attorney for plaintiffs-appellee when he had not made a prima facie case by offering any testimony whatsoever. The apparent justification of the *attorney and the committee* for withholding all information whatsoever from the rest of the plaintiff class, supposedly a danger that such information would aid the defense is not in accord with our rules of discovery. A failure to satisfy the requirement that the representative parties fairly and adequately protect the interests of the class "produces a defect of constitutional dimension, which makes the judgment vulnerable to be reopened on a collateral attack." *Gonzalez vs. Cassidy*, 474 F. 2d 67 (5th Cir. 1973); in re *Four Seasons Sec. Law Citigation*, 502 F. 2d 834 (10th Cir. 1974).

The proposed consent decree, notice and the fairness hearing were all deficient to such an extent that the cumulative effect was to deny due process of law to the objectors.

Many deficiencies of due process may be bent, compromised or narrowed, but the attorney for a party should ethically and professionally represent only the interest of his client or clients. This principal is true without citation or authority or our adversary system has failed. The counsel for the parties should not have engaged in conduct that might even take on the appearance of collusion. The district court had been forewarned by the appeals, Pettway IV 576 Fed. 2d 1157, 1169.

> The interest of lawyer and class may diverge, as may the interests of different class members and certain interests may be wrongfully compromised, betrayed or sold out without drawing the attention of the court," *Pettway* 576 F. 2d 1157, 1169.

For the numerous breaches noted herein the courts writ of certiorari should issue to grant due process to petitioners, reconcile the conflicts in the various circuits and to insure that the mandates of the appellate courts be accorded deference when the matters are implemented in the district court.

The writ of certiorari should be issued in this case for the reasons that an important question of federal law which has not been, but should be, settled by the court and the split in the circuits which is pronounced when the same case receives different treatment on a change in the circuits. The failure by the district court to follow the mandate of the Circuit Court of Appeals and the Eleventh Circuit's failure to enforce the "opt out" provision and implement the opting in of the 399 who cashed their checks had mandated and even reiterated in Pettway III and Pettway IV the "opt out" opportunity to be provided noting the conflict and dissatisfaction that might arise in the attempt to settle the case. The Eleventh Circuit, by quoting this as authority in *Holmes v. Continental Can Company* (supra) adopted the Fifth Circuit holdings as to opting out and due process for individual claimants in the class.

The conflicts of interest and the divided cohesiveness of the class qua the counsel so permeated the proceedings that the requirements of due process for adjudication taken in the name of the 399 previously identified and those objecting to the procedures and adequacy of the settlement were substantially breached. *Phillip v. Klassan*, 1974, 502 Fed.2d 362, 163 U.S. App. D.C. 360 cert. denied 95 S.Ct. 309; *Nguzen v. Kissinger*, 70 F.R.D. 656 (D.C. Cal. 1976); app. dismissed, 602 Fed.2d 925.

This court in *Gen. Tele. Co. of Southwest v. Falcon*, 457 U.S. 147, 72 L.Ed.2d. 740, 1025 S.Ct. 2364:

> We have repeatedly held that "a class representative must be part of the class and *possess the same interest* and suffer the same injury as the class members" *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395, 52 L.Ed.2d. 453, 97 S.Ct. (1894) . . . (emphasis added).

The class representative and defendant thwarted "the same interest" of the class when they failed to hold the "opt in" procedure suggested by the court of appeals in *Pettway V. American Cast Iron Pipe Company*, 576 Fed.2d 1159 (1978 5th Cir.) pg. 1220, i.3. that is the court set up a procedure for the 399 who cashed their checks to return the monies received or post security for the same. While the court has supported a broad reading of Rule 23 "they do not justify the jettionsing of the cardinal principal that a class representative may not head a class whose interest substantially conflicts with his or her own. *East Texas Motor Freight, Inc. v. Rodriguez*" (supra).

The testing for the adequacy of representation was aptly summed up as to F.R. Civ. P. 23(a) (4) in *Twyman v. Rockville Housing Authority*, 99 F.R.D., 314 (1983):

> *Because absent members of the class would be conclusively bound by results obtained by representatives and their attorney due process requires they be more than proforma representative.* c.f. *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed.2nd 22 (1940) (emphasis added).

Mr. Wiggins, the class attorney, had the competency to recognize the problems as to the conflicts within the class as he had been lead counsel in the Pettway cases since 1975 and obtained the "opt out" rights and "opt in" procedure in Pettway IV.

The lower court was not without guidance for as herein Pettway III (supra) gave explicit instructions and the Fifth Circuit again in Pettway IV advised the lower court that an "opt out" right should be provided for persons dissatisfied with their entitlement and the other 399 who cashed checks be allowed to come back in as full members of the class not as second class claimants. Surely it could not be argued that under Rule 23 the district court can't require inclusion of an opt out right as noted in *Holmes vs. Continental Can Co.* (supra) but the Fifth Circuit Court of Appeals did not possess the power exercised in Pettway III and Pettway IV.

These clear instructions were not lost or forgotten but were cited with approval by the *Eleventh Circuit in Holmes vs. Continental Can 706 Fed. 2nd, 1154 (1983)* and the irony of the situation is that *Mr. Robert Wiggins, attorney for the class* obtained a reversal of a *consent decree* for failure to include an "opt out" right for individuals when *he at the same time was co-author of this settlement where the 5th Circuit had mandated an opt out provision.* This does not speak of equal protection or for representation, but cries out for redress to fulfill the promises of those who labored since 1966 to correct the "scourge of discrimination."

The decision by the Eleventh Circuit Court of Appeals in this petition has the unique distinction of being a case wherein there exists a conflict with the decision of the Fifth Circuit Court of Appeals in *the same case* and on the identical *proposition of law*, ie. the Fifth Circuit Court of Appeals mandated that a procedure for persons dissatisfied with any future settlement be established allowing them to opt out and pursue their claim in the same suit, *Pettway vs. American Cast Iron Pipe Co.* 576 Fed. 2nd, 1157 (5th Cir., 1978); cert. denied 439 U.S. 115 (1979).

Rule 23 envisions the court making orders to effectuate the purpose of the rule in line with the "opt out" right urged herein "Rule 23 . . . In the conduct of actions to which this rule applies *the court* may make appropriate orders . . . (2) requiring for the protection of the members of the class or otherwise for the fair conduct of the action . . . or of the opportunity of members to

signify whether they consider the representation fair and adequate . . ." This accords with the courts of the various circuits noting this method of requiring an opt out in b(2) class actions.

The defendant, American Cast Iron Pipe Company, has a pending petition for certiorari being Supreme Court case number 82-1074 and therein is urged that the court's proposal of hearing individual claims by a special master was proper and relied on language from this court out of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) and sought to place the burden of proof on each individual his entitlement to an award. The defendant would impose on the individual the burden of going forward to prove his entitlement but does not even accord him due process by way of dedicated legal counsel in so complicated a case. Teamster (supra) can not stand for this proposition for our court surely would not impose so great a burden without a corresponding guarantee of due process.

Therefore petitioners are unable to see that any distinction can be found to justify the split of the circuits in the case within the case, Pettway III; Pettway IV; and Pettway VI (the instant case).

The writ of certiorari should be issued in this case for the reasons that an important question of federal law exists which has not been, but should be, settled by this Court and the split in the circuits on this issue causes different results on identical facts depending on where the cause of action arises.

ISSUE II

Whether "opting out" of a 23 (b) (2) civil rights class action is permissible and in certain occasions mandatory where class members are denied substantive due process with the Circuit Courts of Appeals being divided on this issue which has not but should be settled by this court.

The United States Supreme Court has not decided the question of the right of a b(2) class member to opt out of the class and the permissibility of opting out. The several circuits have split on the issue and the necessary usage of class action under Rule 23, Federal Rules of Civil Procedure, to dispose of multiple claims and defenses mandates the court define the parameters of

conserving the courts' and parties' energies and expenses with the deprivation of class members due process rights to a point that the "fairness hearings" become patently unfair.

The Eleventh Circuit in Holmes vs. Continental Can, 706 Fed. 2nd, 1144 (1983), Judge Vance noted:

> (11) The United States Supreme Court has not yet decided whether opting out of (b) (2) classes is ever permissible, and the circuit courts of appeals are split on the issue. Compare *Plummer v. Chemical Bank*, 668 F.2d at 657; *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981); *Laskey v. International Union, United Automotive; Aerospace & Agricultural Implement Workers*, 638 F 2d 954, 956 (6th Cir. 1981); *Penson v. Terminal Transport Co.*, 634 F2d 989, 993 (5th Cir. 1981); *Bauman v. United States District Court*, 557 F2d 650, 659-60 (9th Cir. 1977). Cases examining the right to opt out of Title VII class actions brought under subsection (b) (2) reflect a tension between the policy of facilitating antidiscrimination class actions and the need to protect the rights of absent class members. The general rule in this circuit remains that absent members of (b) (2) classes have no automatic right to opt out of the lawsuit and to prosecute an entirely separate action. See *Penson*, 634 F. 2d at 993; *Grigsby v. North Mississippi Medical Center, Inc.* 586 F.2d 457, 461 (5th Cir. 1978); *LaChappelle v. Owens-Illinois*, 513 F2d 286, 288 n. 7(5th Cir. 1975); *United States v. United States Steel Corp.*, 520 F.2d 1043, 1957 (5th Cir. 1975), cert. denied 429 U.S. 817, 97 S. Ct. 61, 50 L.Ed.2d 77 (1977).

The abuse engendered by the attempts of the several circuits to balance the rights of individuals with due process and fairness has been the subject of serious inquiry:

> (I)n *Wetzel* [*v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3d Cir. 1975)], the court in part justified its refusal to require notice for absent members by pointing to the need to effectuate the policies of Title VII: "Suits brought by private employees are the cutting edge of the Title VII

> sword which Congress has fashioned to fight a major enemy to continuing progress, strength, and solidarity in our nation, discrimination in employment . . . The imposition of notice and the ensuing costs often discourage such suits."
>
> This passage epitomizes the dilemma spawned by the growth of Title VII back pay class actions. Courts are mindful of the fact that traditional (b)(2) certification policies deprive absent members of due process consideration, but justify it in the name of the "overriding" public policy objectives of Title VII and continue to classify herterogenous (sic) classes under (b)(2) rather than (b)(3).
>
> The irony here, of course, is that while granting the class great deference on the substantive and policy issues in a suit, courts deny many members of the class procedural fairness.
>
> Rosen, Title VII Classes and Due Process; To (b)(2) or Not To (b)(3), 26 Wayne L. Rev. 919, 952 (1980) (footnote omitted).

The courts in the earlier Pettway cases in justifying its previous orders in Pettway III and IV to include a right to "opt out" in the event a member of the class disagreed as to his entitlement on a settlement in the future reasoned that although the action was initiated as a Rule 23(b)2 in the back pay aspect it "begins to resemble a 23(b)3 action" *Pettway vs. American Cast Iron Pipe Company* (Pettway III), 411 Fed 2nd, 908 (5th Cir.) *Pettway vs. American Cast Iron Pipe Company* (Pettway IV), 576 Fed 2nd, 1157 (1978). *Penson vs. Terminal Transport Company*, 634 Fed 2nd 994 (5th Cir.)

The ninth (9th) Circuit Court of Appeals has arrived at a similar holding in allowing an opt out of a 23 (b)2 class action reasoning that "given the breadth and nature of the claims asserted the class allegations in the plaintiff's complaint and the procedures adopted by the district court it appears clear that this case was in essence a Rule (23)(b)(3) class action." *Officers for*

Justice vs. Civil Service Commission, 688 Fed 2nd 615, 634-635 (9th Circuit 1982)

In trying to provide due process rights for individual members several circuits have allowed an "opt out" procedure justifying this under the "discretion of the court" as set forth in *Holmes vs. Continental Can Company*, 1154, (supra).

> This is not to suggest, however, that opt out procedures have no applicability to the (b) (2) class action. Parties to a proposed class action settlement may themselves provide for an opt out procedure by which class members may exclude themselves from the class and litigate their claims in the same action or in a separate lawsuit, see, e.g., *Parker v. Anderson*, 667 F.2d 1204, 1208 (5th Cir.), cert. denied—U.S.—,103 S.Ct. 63, 74 L.Ed.2d 65 (1982); *Penson*, 634 F2d at 995; *Cotton*, 449 F2d at 1333; *West Virginia v. Chas. Pfizer Co.*, 440 F. 2d 1079, 1982 (2d Cir.), aff'd by an equally divided Court, 404 U.S. 548, 92 S.Ct. 731, 30 L. Ed.2d 721 (1971), and in appropriate cases a court may conclude that a proposed settlement should be disapproved unless the parties agree to such a procedure. In *Penson v. Terminal Transport Co.*, the former fifth circuit held that "although a member of a class certified under Rule 23(b)(2) has no absolute right to opt out of the class, a district court may mandate such a right pursuant to its discretionary power under Rule 23." 634 F.2d at 993. This holding followed from Pettway III, where the court reasoned that Title VII claimants "dissatisfied with their portion of the (back pay) award should be allowed to opt out in order to prove that they were entitled to a larger portion." 494 F.2d at 263 n. 154. On remand the district judge entered a final order providing "a mechanism for subclass members to opt in or out of the settlement." 576 F.2d at 1166 n. 2. When the case once again came before the former fifth circuit, Judge Goldberg in Pettway IV stated that the court had "recently commented that opting out of the lawsuit altogether after a back pay award settlement is not permitted in 23(b)(2) class actions." Id. at 1220. Judge

> Goldberg read footnote 154 in Pettway III to require that "dissatisfied claimants be given an opportunity to prove entitlement to a larger individual award in the same lawsuit."

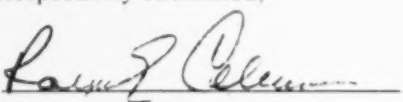
It is of interest here that the majority here are the individuals who objected to the $1,000,000 settlement in 1975 and that there is a reversal in roles. The Court of Appeals, 5th Circuit had mandated and even reiterated in Pettway III and IV the opt out opportunity to be provided noting the conflicts and dissatisfaction that might arise in the attempt to settle the case. The 11th Circuit by quoting this as authority in Holmes vs. Continental Can Company (supra) adopted the 5th Circuit holdings as to opting out and due process for individual claimants in the class.

Therefore, petitioners are unable to see that any distinction can be found to justify the split of the circuits in the case within the case, Pettway III; Pettway IV; and Pettway VI (the instant case).

CONCLUSION

In view of the foregoing, this Court's Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, reverse the judgments of the Court of Appeals and the District Court entering such orders as necessary to effectuate the holdings in Pettway III and Pettway IV and to assure adequate representation of all members of the class.

Respectfully submitted,



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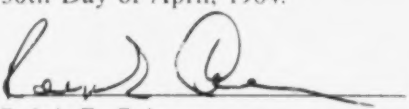
PROOF OF SERVICE

I, Ralph E. Coleman, a member of the Bar of this Court as counsel of record for petitioners here, Charles L. Daniel, et al, hereby certify that three copies of the above and foregoing Petition for Writ of Certiorari, together with appendices thereto, have been served by United States mail, postage prepaid and properly addressed upon Robert L. Wiggins, Jr., Attorney at Law, Suite 716 Brown-Marx Building, 2000 1st Avenue North, Birmingham, Alabama 35203, Ms. Marcia B. Ruskin, Office of General Counsel Equal Employment Opportunity Commission, 2401 E. Street, Washington, D.C. 20506, and J. Fredric Ingram, Attorney at Law, 1600 Bank for Savings Building, Birmingham, Alabama 35203 on this the 30th Day of April, 1984.



Ralph E. Coleman

83 - 1802

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

CHARLES L. DANIEL, et al.,
Petitioners,

vs.

RUSH PETTWAY, et al.,
Respondents,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Respondent,

AMERICAN CAST IRON PIPE COMPANY
Respondent

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION NO. 66-315

RUSH PETTWAY, et al.,
Plaintiffs,

v.

AMERICAN CAST IRON PIPE
Defendant.

FINAL JUDGMENT AND RULE 54 CERTIFICATE

With respect to the entry of the Consent Decree resolving all outstanding issues concerning monetary relief and fees and costs associated therewith, it is hereby ORDERED, ADJUDGED and DECREED in accordance with Rule 54 of the Federal Rules of Civil Procedure:

1. That the Court hereby gives final approval to the proposed Consent Decree which was tentatively approved on March 23, 1983;

2. That the Court directs the entry of final judgment pursuant to the provisions of the Consent Decree, the terms of which are incorporated herein by reference;

3. That the Court has determined that the terms of the Consent Decree are fair, adequate and reasonable;

4. That this final judgment is binding and conclusive upon all parties to this action and members of the plaintiff class consisting of all black employees at America's Birmingham, Alabama plant who were employed as of, or hired subsequent to, July 2, 1965 to the present;

5. That the entry of this final judgment and the Consent Decree satisfy all the requirements of Rule 23 of the Federal Rules of Civil Procedure; and

6. That the Court retains jurisdiction of the injunctive relief aspects of this case as heretofore provided for in the Consent

Decree of 1980 approved and entered by this Court on July 14, 1980.

DONE this 12th day of May, 1983.

SEYBOURN H. LYNNE
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 66-315

RUSH PETTWAY, et al.,
Plaintiffs,
v.
AMERICAN CAST IRON PIPE COMPANY,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The current case is before the Court once again on the issue of monetary relief which was first remanded by the Court of Appeals in 1974. The history of this case scarcely needs repeating at this late date. It has been adequately set forth in the previous decisions of the Court of Appeals and this Court. Nevertheless, there are certain salient events which should be stressed as background to the consideration of the particular terms of the proposed settlement and objections which are before the Court.

The case was tried in October, 1971 and findings of fact and conclusions of law were entered in November, 1972. See, 7 FEP Cases 1010 (N.D. Ala. 1972). The Court found that the defendant's testing program violated Title VII under the standards established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). It also concluded that the departmental seniority system did not violate the Act and that the defendant had "practiced no invidious racial discrimination in the administration of its apprenticeship and journeyman programs." 7 FEP Cases at 1018-1019. On the issue of back-pay, the Court concluded that it should not be awarded "in view of the demonstrated good faith compliance by defendant with Title VII . . . and because such an award is not necessary to insure future compliance therewith." *Id.* 7 FEP Cases at 1019. On appeal the judgment was reversed and remanded with instructions to award certain injunctive relief and back-pay. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) ("*Pettway*", hereafter.).

The proceedings on remand in 1974 and 1975 are accurately summarized in the prior decrees and judgments of the Court entered on May 14, 1975, June 12, 1975 and November 20, 1975. On the latter date, the Court entered a Final Order and Modified Judgment in which the proceedings on remand from *Pettway, III, supra,* were summarized. A further description of the proceedings which resulted in the June 12, 1975 Judgment is found in the 1978 decision of the Court of Appeals in this case. See, *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1172-1175 (1979), *cert. denied*, 439 U.S. 1115 (1979) ("*Pettway IV*", hereafter). The Court has carefully reviewed all of the prior proceedings in this action and has taken such proceedings into consideration in determining the fairness, reasonableness and adequacy of the proposed settlement and the adequacy of the representation of the class by the named plaintiffs and the attorney for the class.

Pursuant to the Court's Final Order of November 20, 1975, the Clerk of the Court entered a Judgment Setting Aside and Annulling Back-Pay Awards to 442 Persons Listed On Attached Certified List on January 14, 1976. An appeal had been previously taken by these 442 persons and by an assortment of other segments of the class. The complicated procedural posture of the case is accurately described in *Pettway IV, supra* at 1166-1168. There were a total of 2242 class members as of 1975. Of that group a subclass of 841 persons had been awarded back-pay in the June 12, 1975 Judgment and 1401 class members had been excluded from participating in the back-pay recovery. All of the 1401 members of the latter group were persons hired after July 2, 1965 whom the Court had determined not to have been monetarily injured by the unlawful practices of the defendant. Only 150 of these 1401 class members objected to their exclusion from the back-pay subclass. The 841 members of the back-pay subclass reacted to the 1975 back-pay award in different ways. As already mentioned, 442 of such subclass members refused to accept their back-pay tender and 399 accepted such tender and executed a release. Of the latter group of 399 subclass members, 252 of them were characterized by the Court of Appeals as having "accepted checks and not appealing decision." *Pettway IV, supra*

at 1167. The remaining 147 subclass members who cashed their 1975 back-pay checks were characterized as "objectors" by the Court of Appeals. *Id.* The total number of back-pay subclass members who were found to have either objected to the back-pay or signed the notice of appeal in 1975 was 589. *Id.*

On remand from *Pettway IV*, *supra*, the procedural structure of the class was further complicated. On October 25, 1979 the Court ordered that every member of the class be given notice of the status of the case and be given the opportunity to notify the Court of their interest in participating in the back-pay proceedings on remand. The notices to the class were sent by certified mail to the homes of over 2400 persons in late October, 1979. They were given until December 1, 1979 to file a Notice of Intent to Participate in Back-Pay. Approximately 1215 class members timely returned such Notices to the Clerk of the Court. The parties then settled the injunctive features of the case that had been remanded in the fourth appellate mandate. Notice of the proposed entry of the Consent Decree of 1980 was given to the class and a hearing was held on objections on July 14, 1980. A number of the objections concerned the bifurcation of the settlement process into injunctive and back-pay halves. The Court carefully considered these objections in its Findings of Fact and Conclusions of Law entered July 25, 1980 and reached the following conclusion.

> 13. This Court has expressed in a writen Order entered on June 18, 1980 its firm intent to 'proceed forthwith with all possible speed to adjudicate the back-pay claims of all affected employees'. The Court informed counsel for both parties at the close of the July 14, 1980 hearing that it expected them to proceed immediately with negotiations aimed at settling all remaining monetary issues and that if such issues could not be settled with some dispatch, the Court would set the wheels in motion for a trial of the back-pay claims of each class member. Such remains the intent of this Court. The parties are again instructed to expedite their review of their respective positions and to make all reasonable efforts to resolve their differences over back-pay with all possible

speed. If this cannot be accomplished, the Court will set the back-pay claims down for trial at the earliest opportunity after the parties have notified the Court that their efforts have failed.

14. For these reasons, the Court finds that the objections concerning the bifurcation of the back-pay issues from the injunctive issues are not supported by any evidence or rationale and does not deprive the proposed Consent Decree of the fairness, adequacy, and reasonableness necessary for its approval.

It is significant that of the nine class members who objected to the settlement of the injunctive relief separately from the back-pay, only one of such class members has entered an objection to the current back-pay settlement proposal.

The events surrounding the approval of the Consent Decree of 1980 bear some importance to the approval of the back-pay settlement now before the Court. As just mentioned, the class was informed by the Court at the July 14, 1980 hearing on the injunctive settlement that the Court expected serious efforts at settlement of the back-pay issue to be accomplished expeditiously. The attorney for the class and the class representatives told the class at its regular monthly meetings during the latter half of 1980 that back-pay settlement efforts were being made. Similar notice to the class was given by the class attorney and the class representatives throughout 1981, both orally and in writing. At no point did any member of the class step forward and object to back-pay settlement negotiations on their behalf by the attorney for the class and the class representatives. For this reason, among others, the Court is not impressed with assertions by certain objectors that they were excluded from the back-pay settlement process.

After approval of the injunctive settlement in July, 1980, the parties attempted to reach an agreement that would settle the remaining monetary issues in the case. The parties, however, were very far apart in their veiw of an adequate back-pay award. The greatest amount offered by the Company during that period was approximately 1.4 million dollars. The latter amount

included the approximately $483,000 which had been cashed in 1975 by 399 class members. Thus, the total additional amount of money which was being offered in excess of the one million dollars tendered in 1975 was less than $500,000. The attorney for the class and the class representatives were in agreement that settlement discussions in that range of recovery were unacceptable. While the class attorney believed that negotiations should be continued, the Committee For Equal Job Opportunity elected to terminate such discussions and begin preparation for trial of the back-pay issues. This decision was reported to the class at its regular monthly meetings in September and October, 1980 and was reported to the Court in the first week of October of that year.

On October 20, 1980 the Court ordered that notice be given to the class of its duty to individually answer interrogatories propounded to the class by the defendant. The interrogatories and the notice to answer them were mailed to all class members who had filed a Notice Of Intent To Participate In Back-Pay. They were given 90 days to answer such interrogatories and another 90 days in extensions were subsequently granted by the Court. Ultimately only 833 class members responded to the interrogatories out of the 1215 persons who had given notice of their intent to claim back-pay. All of such class members were interviewed by and given the assistance of the attorney for the class in responding to such interrogatories. In this regard, the Court pauses to note that the current back-pay settlement does not condition participation in the recovery on filing a response to the interrogatory answers. A substantial number of the class members who are scheduled to receive back-pay under the proposed settlement would be excluded if the parties had conditioned participation on the filing of interrogatory answers.

After further discovery skirmishes which are too tedious to mention, the plaintiff proposed that the Court appoint a Special Master for the purpose of acting as a mediator in settlement discussions. On June 2, 1981 the Court granted that request, which was unopposed by the defendant, and appointed William F. Gardner as a Special Master for the limited purpose of conducting settlement negotiations. After numerous meetings

between the parties and the Special Master, settlement negotiations once again failed. This was reported to the Court by the Special Master on July 7, 1981. The respective positions of the partes were still far apart. Although a settlement offer was never made by the defendant for an amount greater than the 1.4 million dollars that was rejected in September, 1980 by the plaintiffs, the defendant did discuss figures which went as high as 1.7 or 1.8 million. Such amounts, however, continued to contain offsets or credits for the $483,000 that was cashed in 1975. In terms of "new" money, the Company did not contemplate any offers greater than 700 or 800 thousand dollars more than had been tendered in 1975.

After settlement efforts once again were terminated, the Court held a conference with the parties on July 17, 1981 and entered an Order of Referral to Special Master which referred the entire back-pay issue for trial on an individual-by-individual basis. The plaintiff class strongly opposed such a method of trial and also opposed any effort by the Company to make an Offer of Judgment directly to individual members of the class. An appeal of the Court's allowance of the latter was immediately filed. A Petition For Writ Of Mandamus was also filed challenging both the permission to mail an Offer of Judgment directly to the class members and the referral to a Special Master for individual-by-individual trials. The Petition For Writ Of Mandamus was denied but the plaintiffs then filed an appeal challenging the same issues. The Court of Appeals accepted the interlocutory appeal and vacated the Order of Referral and the Order allowing direct mailing of an Offer of Judgment. *Pettway v. American Cast Iron Pipe Co.*, 681 F.2d 1259 (11th Cir. 1982). In a companion appeal, the E.E.O.C. was also reinstated as an intervenor in the case. *Pettway v. American Cast Iron Pipe Co.*, 681 F.2d 1269 (11th Cir. 1982). The Company then filed a Petition For Writ Of Certiorari to the Supreme Court. That Petition is still pending and will not be reviewed by the Supreme Court unless the proposed settlement is disapproved by the Court.

The foregoing procedural background is important in assessing the adequacy of the representation of the class and the overall fairness of the proposed settlement. It is also important as

a preface to the objections which have been filed by certain class members. The Court now proceeds to consider whether the proposed settlement should be approved.

I. THE TERMS OF THE PROPOSED SETTLEMENT

The proposed settlement involves a total payment from the defendant of $3,983,401.91 in satisfaction of all monetary claims for racial discrimination which have been asserted as a part of this action. Of this amount, the defendant has already paid $483,401.91 to 399 members of the class as a result of the abortive settlement in 1975. The remaining $3,500,000 required to be paid by the proposed Consent Decree has been gathering interest since March 8, 1983 at a rate equivalent to the "open ended" REPO rate on U.S. Treasury Bills quoted by the First National Bank of Birmingham on a daily basis. The total value of the settlement of the monetary issues in this case substantially exceeds four million dollars when the interest provided in the proposed Decree is included. This figure, of course, does not include the very valuable benefits secured for the class as a result of the previous settlement of the injunctive features of the case which are embodied in the Consent Decree of 1980.

The approximately four million dollars secured by the proposed settlement is not a fund which was negotiated in the abstract by the parties. It is comprised of various funds which were calculated and negotiated separately from one another. These separate funds are set forth in the proposed Consent Decree and need not be repeated herein. The various methods of division of each of these funds among the class members meeting the conditions of eligibility for participation within each fund is set forth in the Schedule of Distribution and Division of Back-Pay and Costs which was filed with the proposed Consent Decree.

The proposed settlement does not call for each member of the class to participate in the recovery. Only those class members who filed a Notice of Intent to Participate in Back-Pay in 1979 are eligible to participate under the terms of the proposed settlement. Of that group of 1215 persons, the parties have agreed that no class member who had less than two years of service prior

to January 1, 1979 coud have been monetarily injured by the unlawful practices found in this case.

II. FACTORS FAVORING APPROVAL

Before considering the validity of the various objections that have been filed, the Court must address the question of whether the proposed settlement should be approved even in the absence of any objections. The burden of proof of the fairness, adequacy, and reasonableness of the proposed settlement is upon its proponents. The proponents in this case are the defendant Company, the class representatives, the attorney for the class, the Committee For Equal Job Opportunity, and the vast majority of the class itself. In addition, the Equal Employment Opportunity Commission as an intervenor in this action has expressed its approval of the proposed settlement. Unlike many class actions in which the class is unaware of the terms of the settlement until after it is reached, the class in the current case was kept informed of the terms of the settlement and allowed to vote on it as a group before it was ever incorporated into a *Memorandum Of Understanding* between the parties. At the monthly meeting with the class in January, 1983 the terms of the proposed settlement which were eventually agreed upon in March were explained to the several hundred class members in attendance and all but five persons voted in favor of it. While such vote is not binding upon the parties or the Court, it does signify that the proponents of the settlement include more than the class representatives and the class attorney. It includes the entire Committee For Equal Job Opportunity and it includes over 95% of the class.

In a very real sense, this case is now the mirror image of itself as it existed during the fourth appeal. In *Pettway IV, supra*, the Court of Appeals observed that:

> All of the active named plaintiffs, all of the elected representatives on the Committee For Equal Job Opportunity, and 70 percent of the subclass objected to the settlement. ***If 100 percent of the subclass had objected we could say with complete confidence that 'the class' has not settled its claim. At least under the limited circumstances of this case, our confidence is not shaken

> when the figure is reduced to 70 percent. Where such a large percentage of the class objects there must be something, not necessarily rotten in Denmark, but unfair to the principality consisting of a class as a whole. The district court abused its discretion in approving this back-pay agreement. *Id.* 576 F.2d at 1217-18.

Now we have the opposite and more compelling situation.

The Court, however, is not content to simply count the number of objections and observe that they are less than 5% of the class. The Court agrees with and is bound by the reasoning contained in *Pettway IV*, *supra* at 1217, to the following effect.

> While majority rule is not the test in every case, in the context of determining the total back-pay award majority sentiment becomes highly relevant. We stress that this is not a dispute over the allocation of a settlement fund, with respect to which the court should not allow a majority, no matter how large, to impose its decision on the minority. In such circumstances, objection by a few dissatisfied class members should trigger close judicial scrutiny to ensure that the burden of the settlement is not shifted arbitrarily to a small group of class members. Here the dispute centers around the sufficiency of the settlement fund. Each subclass member's interest in the size of this fund is substantially the same and there are no conflicts of interest among definable groups within the subclass. The decision to approve this settlement thus may appropriately be described as an intrinsically 'class' decision in which majority sentiments should be given great weight. *Id.* 576 F.2d at 1157.

For these reasons, the Court places considerable weight on the fact that over 95% of the class has not objected to the proposed settlement insofar as the question of the adequacy of the total award is concerned. As to the allocation of the total award, however, the Court places less emphasis on the percentage of objectors. Instead, close judicial scrutiny of the validity of the allocation of the back-pay among the various segments and members of the class is required.

Even as to the adequacy of the total recovery, the Court does not rely exclusively on the fact that the class representatives and the majority of the class have expressed their approval. While the Court has not reviewed the monetary value of the settlement in a vacuum, it must be concluded that the amount obtained by the plaintiffs is impressive standing alone. In no sense can it be labeled as a token payment unworthy of the most serious consideration by the class. The Court is unaware of any back-pay recovery in the Northern District of Alabama which has approached the magnitude of the recovery set forth in the proposed Consent Decree in this case. There have been many comparable cases in this District in the nearly eighteen years since the Civil Rights Act of 1964 became effective and none of them have involved a greater collective or average individual recovery for the members of a class than does this case.

A comparison with similar cases is not the only benchmark which indicates the adequacy and reasonableness of the total recovery. The experts for both parties have conducted extensive calculations of back-pay based on differing reconstructions of what would have been expected to occur in employee job movements in the absence of the racial discrimination found in this case. These calculations were done separately by each expert based on a computerized data bank extracted from the employee records of the defendants. The computer print-outs containing the calculations of the plaintiffs' expert were made available to the attorneys for the objectors and to any objector who requested it. Only one of the attorneys for the objectors took advantage of this opportunity and examined the plaintiffs' expert's calculations. None of the objectors did so. The calculations of the opposing experts differ from one another in the method of calculation but, when considered together, demonstrate that the proposed settlement amount is within the range of the total recovery which could be expected to be obtained by the class at trial.

Not unusually, the defendant's expert states that the total settlement is on the high side of what the plaintiffs might have expected to recover at trial while the plaintiffs' expert states that it is on the low side. This result, however, supports approval of

the settlement, not disapproval. The surest indication of a fair compromise is when two vigorous advocates have made concessions to the point that they both believe the other side has obtained the best of the bargain. That is exactly what has occurred in the current case. A considerable part of the dissatisfaction of the objecting class members is nothing more than the lingering suspicion, engendered by hindsight, that another dollar in concessions could have been wrung from the process of negotiation. If approval of a settlement depended upon the absence of such ever-present doubts, then no class action would ever be settled.

None of the objectors have offered any basis upon which the Court could conclude that the total recovery is less than what the plaintiff class could realistically expect to recover at trial. Indeed, they have shown a remarkable lack of interest on the entire question of the adequacy of the overall settlement fund or in how it was calculated. Not only did they fail to take advantage of the opportunity to inspect the detailed calculations of the experts, but they failed to even request the opportunity to depose or cross-examine either expert prior to or during the fairness hearing. If there were any serious contention that such calculations were unfair, unreasonable, or inadequate the Court would expect that the objectors would have cross-examined the experts on such contentions either at a deposition or at the fairness hearing.

For the Court's part, the expert calculations are found to be an accurate and complete accounting of the monetary effects of the racial discrimination involved in this case. The calculations performed independently by the experts retained by both parties fully support the contention that considerably less than the amount provided in the proposed settlement might have been recovered at trial. The Court can find no plausible basis to conclude that the plaintiffs had a reasonable likelihood of recovering a substantially greater amount at trial. For these reasons, the Court concludes that the proponents of the settlement have carried their burden of establishing the fairness, adequacy and reasonableness of the total monetary recovery. The objectors have failed to seriously content otherwise and the evidence fully supports the position of the proponents.

The contentions found in the formal objections filed prior to the fairness hearing do not concern the adequacy of the total amount recovered. Rather, they contend that the allocation or distribution of the total settlement is unfair and unreasonable. This contention takes several forms, some of which conflict with one another. First, a group of 51 class members who cashed their checks and executed releases in 1975 argue that they should have received shares which were exactly equal to comparably senior class members who rejected their individual awards in 1975. Secondly, a group of 23 class members who rejected their 1975 back-pay awards argue that they should have received larger individual shares of the total recovery.[1] Oddly enough, these two groups of objectors do not support one another.

A. Treatment Of The Class Members Who Cashed Their Checks And Executed Releases in 1975

As already mentioned, there were 399 class members who accepted their back-pay awards and executed releases of all claims in 1975. In late 1979 those 399 class members were given the opportunity to file a Notice Of Intent To Participate In Back-Pay. A Notice explaining their right to signify their interest in participating in the back-pay proceedings was sent to the homes of the 399 class members who cashed their 1975 checks in October, 1979. Only 257 of them responded to the Notice by filing a Notice Of Intent To Participate In Back-Pay. Of the 142 who did not respond, eight have now filed objections to the proposed settlement. At the hearing on objections held May 12, 1983, these eight class members failed to offer any excuse for not following the instructions in the 1979 Notice to the class by filing the required Notice Of Intent To Participate In Back-Pay. After having cashed their checks and executed releases in 1975 and having ignored the requirement of filing a Notice Of Intent To Participate in 1979, it is too late for these eight class members to expect the remainder of the class to give up the recovery contained in the proposed Consent Decree so that they can belatedly be included in the back-pay distribution. The

[1]Objections which do not fall into these two groups are discussed at a later point of this Opinion.

proponents of the settlement have fully satisfied the Court that the proposed settlement is fair, adequate and reasonable in conditioning distribution of the back-pay upon timely filing the 1979 Notice Of Intent To Participate.

The 257 class members who executed their back-pay checks and the attached releases in 1975 and who filed the 1979 Notice Of Intent To Participate are sharing in a total fund of $128,500. Of these 257 class members, only 43 have objected to their individual share of the recovery. The remaining 214 class members are apparently in support of the proposed settlement, even though there was an active effort on the part of the 43 objectors to solicit opposition against the settlement. The Court does not fault the efforts to solicit those who cashed their 1975 back-pay checks against the settlement. Once that effort has produced only 43 objections, however, that fact takes on some degree of relevance in assessing the validity of the objector's claim that they were abusively treated during the settlement negotiation process. It also bears on the Court's assessment of the fairness, adequacy, and reasonableness of the overall recovery of this particular segment of the class.

The relative paucity of objectors from the group of class members who cashed their 1975 checks is not the only indication of the lack of merit of the objections from this group. The attorney for the class brought the contentions of this group to the Court's attention prior to the preliminary approval of the Consent Decree. The Court considered these objections on a preliminary basis in its Findings of Fact and Conclusion of Law Giving Preliminary Approval To Proposed Consent Decree entered March 23, 1983. Even though these findings were entered six weeks prior to the fairness hearing on May 12, 1983, none of the objectors have contended or submitted evidence which suggests that any of such findings and conclusions were erroneous. The Court has now considered such findings and conclusions again in light of the evidence and arguments offered at the May 12, 1983 fairness hearing. After doing so, the Court finds that the preliminary findings and conclusions entered in support of preliminary approval of the settlement are fully supported by the evidence. The Court has given close scrutiny to

the entire treatment of the class members who cashed their checks and executed releases. That scrutiny has included a review of the Court's own treatment of the objections of this group of class members in the opinion giving preliminary approval to the settlement. Even when considered in the light most favorable to these objectors, however, the Court is convinced that their interests have been adequately represented by the class representatives and the attorney for the class and that the settlement is fair, adequate and reasonable in the provisions made for the class members who accepted their back-pay awards in 1975.

The objections of these class members stem from a fallacy in their view of the settlement negotiation process. Underlying their entire position is the assumption that the parties negotiated the total recovery as a lump sum and then set about to allocate it among the different segments of the class according to some arbitrary notion of relative merit. That assumption has been shown by the evidence to be false. The total recovery is merely the sum of its parts. Each amount allocated to the differing segments of the class, and to the class attorney and expert, was negotiated separately and independently from every other part. Each discrete segment of the class had to stand on the strength of their own claims rather than borrowing from the strength of some other group in an effort to leverage a greater recovery than their claims merited on their own. This is the real point of departure for the dissatisfaction of the 43 objectors who cashed their checks in 1975.

The Court is unable to fault the process of negotiation followed by the parties in this case. There is nothing inherently unfair in requiring the claims of each discrete segment of the class to rise or fall in the negotiation process on the strength of their own claims, rather than on the strength of some other segment of the class. The claims of the group of class members who cashed their checks and executed releases involved distinct legal problems which were not involved in the claims of the remainder of the class. These problems are correctly set forth in the Findings Of Fact And Conclusions Of Law Giving Preliminary Approval To Proposed Consent Decree entered on March 23, 1983. Those

findings and conclusions are adopted and reaffirmed by the Court on the basis of the evidence received at the hearing on objections on May 12, 1983.

The objectors have not presented any persuasive evidence that their claims were stronger than they were assessed by the class representatives during the negotiation. There is no credible evidence which indicates that any of the 43 objectors who cashed their checks and executed releases were covered by the November 20, 1975 Order of this Court or by any other event which occurred during that period. To a man, those checks and releases were executed freely and voluntarily.

The Court finds that the value placed on the claims of this group of objectors by the parties to the settlement is fair, adequate and reasonable. The Court of Appeals recognized in *Pettway IV*, *supra* at 1221, n.82, that "some or all subclass members might receive a smaller back-pay award on remand than their present share of the settlement." While the objectors take the amounts they cashed in 1975 for granted, the parties to the settlement and the Court do not. There was the very real possibility that some or all of the class members executing their back-pay checks in 1975 could have received less at trial and would have had to refund their overpayment with interest to the defendant. *Id.* at 1221. The current settlement avoids that risk by allowing the class members to keep the amount received in 1975 and to receive an additional sum in the current settlement. The objectors have not presented any evidence which indicates that they reasonably could expect to have received more by going to trial. The recovery provided by the proposed settlement for the class members who executed their back-pay awards in 1975 amounts to $611,901.91 in back-pay plus the value of the use of the money for eight years and the increased monthly pension payments resulting from the 1975 award. The Court finds that under all the facts and circumstances presented, the proposed settlement is fair, adequate and reasonable in the amount allocated to this group of class members.

In addition to their objection that they were inadequately represented in the settlement negotiations, this group of objectors also included certain other contentions within their

written objections. Each of the 43 objectors who accepted their 1975 back-pay awards filed the same form objection. All of them contained several contentions which are frivolous on their face. First, they state that the proposed monetary settlement "has not been enforced by means of injunction." The injunctive Consent Decree of 1980 was entered by this Court in July, 1980 and is a matter of court record. Each of these 43 objectors were given notice of such Consent Decree and an opportunity to object. None of them did so. The Court has retained jurisdiction over the injunctive Consent Decree since July, 1980 for the purpose of entering any additional or different relief which may be appropriate but none of these objectors have ever come forward to request such additional injunctive remedies. The Court finds that this objection is without even the semblance of merit.

Secondly, the form objections state that "(p)lay rates, seniority and promotion (were) not used to calculate the amount paid to each class member." The evidence presented at the hearing on objections was to the contrary. The amounts received by the class members who accepted their back-pay checks were calculated according to a formula devised by the Court itself in the Judgment entered June 12, 1975. That formula took into account a class member's seniority and the highest job and pay rate he attained with the defendant. The formula used to determine individual shares in the current settlement also took into account seniority and/or the highest job and pay group attained by each class member. The objectors have failed to present any evidence which supports their contention on this point.

Thirdly, the form objections state that the "(c)heck cashers did not agree to settlement fund made subject to notice." Again, the evidence fails to support this contention. Only 43 out of 257 "check cashers" who filed a Notice Of Intent To Participate In Back-Pay have objected. All of the "check cashers" were allowed to attend the meetings of the class held in January, February, and March of this year and voice their objection to the proposed settlement *before* it was agreed to by the class representatives. None of them spoke against the "settlement fund" at these meetings. The objectors have failed to present any contrary evidence. Moreover, there is not any legal requirement that every

individual member of the class "agree" to a settlement. It is enough that the settlement be agreed to by the class representatives so long as it is fair, adequate and reasonable.

Fourthly, the form objection states that the class members filing it "(o)bject generally to subclassification of the check cashers." There has been no certification of the check—cashers as a subclass in this case. No party or class member has ever moved for such certification and the Court finds that it would have been inappropriate and unnecessary even if they had so moved. The class as a whole has been vigorously represented by the class representatives and their attorney throughout the period since the 1975 back-pay awards were accepted by these objectors. Not only were the specific interests of the class members who accepted their 1975 awards represented, but they were successfully represented by the existing class representatives and attorney for the class. The Court is unable to find any evidence which supports a contention that subclasses should have been structured or that the representation of the entire class has been inadequate.

The remaining contentions contained in the form objections filed by the class members who accepted their 1975 back-pay awards have been carefully considered by the Court in light of all of the evidence presented. The Court finds that such objections are frivolous and without any evidentiary support in the record. The Court also finds that the treatment of the class members who cashed their checks in 1975 by the class representatives and the provisions made for such class members in the proposed settlement are fair, adequate and reasonable.

B. Class Members Who Are Not Participating In The Proposed Back-pay Distribution

There are two groups of class members who have objected because they have been excluded from participating in the proposed back-pay distribution. One group of 8 objectors complains about the reliance on timely filing of the Notice Of Intent To Participate In Back-Pay as a precondition for receiving ack-pay. A second group of 24 objectors complains about the requirement that a class member have at least two years of service

prior to January, 1979 in order to be included in the back-pay distribution. The Court finds both of these objections to be without merit.

Every person who has worked at the defendant's plant since July 1, 1965 was eligible to participate in the back-pay calculations if he met two prerequisites: (1) he filed a timely Notice Of Intent To Participate In Back-Pay in 1979, and (2) he had at least two years of service prior to January, 1979. These requirements were based on the knowledge of both parties that not every black employee desired to be promoted or was ever in a position to be promoted. A large number of the 2400 members of the class only worked a few days or weeks with the defendant before they quit or were discharged.[2] Another large sector of the class was hired after the remedial decrees in this case had ended the unlawful testing and other discriminatory practices involved in the case. For this reason, both parties desired to narrow the class to that group which had some plausible basis for making a claim that they were denied a promotional opportunity because of their race. At a period in the case when there were no settlement negotiations over the back-pay issue even contemplated, the parties agreed that every member of the class should be given notice of the status of the case and an opportunity to signify his belief that he had been denied promotional opportunities because of their race. The Court, independently from the parties, also determined that such Notice should be provided. Accordingly, the Court ordered on October 25, 1979 that notice be given to the class telling them that they must file a Notice Of Intent To Participate In Back-Pay before December 1, 1979.

When the responses to the Notice were received, it was learned that approximately 160 of the 1215 persons responding to the Notice had not even completed the six month probationary period after hiring. Since all employees, black and white, are ineligible for promotion during such probationary period, it was known by both parties that further refinement of the class eligible to receive back-pay was needed. The parties independently

[2]This action does not involve issues of hiring or discharge.

studied the question of which segments of the class had too little seniority to have had a realistic expectancy of being promoted in the absence of racial discrimination. Through such studies the parties determined that no class member who did not have at least two years of seniority before January 1, 1979 could have been affected by the racially discriminatory practices which are the subject of this action. The latter date corresponded to the entry of the Interim Order by the Court after remand from *Pettway IV, supra*. That Order provided all of the injunctive relief to which the Court of Appeals had held the class entitled in *Pettway III and IV*. That date is consistent with the decision in *Pettway III, supra* at 258, which stated that "(t)he termination date of the back-pay period for most claimants will be the date of the district court's decree implementing our decision . . ." *Id.*

Based on all of the evidence and the Court's intimate familiarity with this lawsuit, the exclusion of any class members who had less than two years service prior to January 1, 1979 or who did not file a Notice Of Intent To Participate in 1979 is fair, adequate, and reasonable.

C. Class Members Who Claim Their Individual Share Should Be Greater

There are 16 class members[1] who rejected their 1975 back-pay awards who are scheduled to receive varying amounts under the proposed decree ranging from greater than $16,000 to as little as $3,000. There are also 6 class members hired after July 2, 1965 who did not participate in the 1975 back-pay tender who are scheduled to receive varying amounts in the proposed settlement based on their seniority with the defendant. Both of these groups claim that their individual share of the total settlement should be greater. Because the back-pay for these two groups was calculated and negotiated according to different standards and considerations, they are considered separately.

The six objecting class members hired after July 2, 1965 who did not receive any back-pay in the 1975 tender are the following:

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[1]One objecting class member who fell into this category, Ben Clark, has withdrawn his objection with the Court.

Gregory Hrabowski
John Jenkins
James Mason
Cornelius Moon
Thomas Porter
William Skones

All of these class members were hired after 1969. None of them were ever subjected to any of the pencil and paper tests which lie at the heart of the liability of the defendant. The years that they have spent in the defendant's employ have been years in which promotional opportunities have been under constant court supervision and a series of remedial decrees designed to provide equal opportunity for the black employees. In the Final Order and Modified Judgment entered November 20, 1975 this Court found "that no black employee employed subsequent to July 2, 1965 has suffered any economic loss due to the Company's testing and educational requirements or from any other alleged discriminatory practice." *Id.* at p. 4. In *Pettway IV, supra* at 1210-1213, the Court of Appeals recognized that this group of class members had not yet entered Stage II proceedings in which they were entitled to a presumption of back-pay.

The parties necessarily took the procedural and historical status of the post-1965 segment of the class into account in negotiating the settlement fund allocated in the proposed Consent Decree for this group. The Court is satisfied that the fund allocated to this group as a group is fair, adequate and reasonable. There are 266 class members who are scheduled to participate in the back-pay distribution who were hired after July 2, 1965. Only 6, or 2.2%, have objected to the amount allocated. These 6 have failed to produce any evidence which indicates that the group *qua* group of post-1965 hires are entitled to an amount greater than they are receiving in the proposed settlement. On the other hand, the calculations of the experts retained by the parties show that they could have received substantially less at trial. In fact, the group as a group may have been excluded from even entering Stage II proceedings under the mandate of *Pettway IV, supra* at 1210-1213, if the settlement in this action had not been reached.

More importantly, the objections of these 6 class members are not couched in terms of an objection to treatment of the post-1965 group *qua* group. The objections actually focus on the individual amounts scheduled to be received by each of them in the settlement. In short, they want more. The formula used to calculate their individual share, however, is a reasonable one. It is based solely on seniority and is identical to the one approved by Judge Guin in *James v. Stockham Valves & Fittings Co.*, CA# 70-178-S (Option dated November 16, 1981). The Court of Appeals in *Pettway III, supra* at 260-261, recognized that any method of calculation or division "creates a quagmire of hypothetical judgments" and is nothing more that a "process of conjecture." *Id.* The proponents of the settlement have carried their burden of proving that the method of calculating individual shares is as fair, adequate and reasonable as any other method that is available.

As to the group of 16 objectors who were hired before July 2, 1965 and who rejected their back-pay award in 1975, the Court reaches the same conclusion. There are 426 class members who are within the same category who support the settlement and have not objected. This fact is entitled to considerable, although not decisive, weight. See, *Pettway IV, supra* at 1217-1218. Of equal importance is the fact that the amount allocated to this group *qua* group is $2,520,083. In 1975 this Court found that $516,598.10 was fair, adequate and reasonable for this same group of class members. The Court of Appeals did not reverse this finding *per se* but held that a settlement should not have been forced upon the class in view of the large number of objections which were found. *Pettway IV, supra* at 1217-1218. The current settlement has increased the back-pay fund available to this segment of the class nearly 500%. The calculations of the experts retained by both parties establish that the settlement fund available to this largest group within the class is within the range of what they could expect to receive at trial. The evidence is clear and convincing that the fund allocated in the proposed settlement for the class members who rejected the back-pay tender in 1975 is fair, adequate and reasonable. The 16 objectors from this group have failed to present any evidence which would support a contrary conclusion.

While the remaining contentions contained in the objections filed by these 16 class members are obviously without merit, the Court is compelled to address them out of an abundance of caution. First, several of the objectors state that they were not informed of the expected testimony of the expert retained by the plaintiffs prior to receiving notice of the proposed settlement. The evidence showed to the contrary. In numerous meetings with the class at St. Paul's United Methodist Church, the attorney for the class reported the results of the expert's calculations. The handful of class members who claim to be unaware of such reports apparently were either absent or were not listening. The Court cannot find any credible evidence to support a contention that the expert's conclusions were hidden from the class. Even if they had been hidden, however, that would not be a ground for disapproving a settlement which is otherwise fair, adequate, and reasonable. There is no obligation on the part of the class representatives and the attorney for the class to divulge the work product of an expert to a large and diverse class prior to negotiating a settlement. The plaintiffs have a strong interest in preserving the confidentiality of expert reports during negotiations with the defendant. No valid purpose would be served by requiring an attorney for the class to divulge his efforts at trial preparation to a class of laymen prior to the time that a definite settlement is reached between the parties. Moreover, any prejudice to any of the objectors raising this contention has been cured by the dissemination of the expert findings to the attorney for the objectors prior to the May 12, 1983 hearing. Nothing within the expert calculations supports a finding that any term of the settlement is unfair, inadequate or unreasonable.

Secondly, several class members have complained about the individual shares of the recovery scheduled for distribution to the members of the Committee For Equal Job Opportunity. While the Court considered such objections in the findings and conclusions entered in support of preliminary approval of the proposed Consent Decree, the Court has considered the matter again in light of the evidence developed at the hearing on objections. After doing so, the Court has independently determined that the findings and conclusions entered on March

23, 1983 as a part of the preliminary approval of settlement are correct and fully supported by the weight of the evidence. Only six class members out of over 2400 have complained about the relatively larger individual shares accorded to the leaders of the class who have served on the Committee For Equal Job Opportunity. For the reasons expressed in the findings and conclusions entered by the Court on March 23, 1983, the Court finds that the scheduled distribution to the members of the Committee For Equal Job Opportunity is fair, adequate and reasonable.

III. POST-HEARING MOTIONS AND OBJECTIONS BY CLASS MEMBERS

After the hearing on the fairness of the proposed settlement two groups of objecting class members filed motions for rehearing under Federal Rule of Civil Procedure 59. In these motions a number of contentions were raised which were not presented prior to or during the fairness hearing on May 12, 1983. At this late stage of the case, the Court can find no justifiable reason for allowing class members to raise matters which should have been presented prior to the fairness hearing and the April 22, 1983 deadline for objections. Under even the most liberal reading of Rule 59, the movants have failed to demonstrate any evidence which is newly discovered or could not have been presented at the May 12, 1983 hearing. Indeed, the movants have failed to even articulate what additional evidence they would present at any rehearing. The Court gave the objecting class members a full opportunity to present any evidence which they considered relevant to the issue of whether the proposed settlement should be approved. Although the attorneys for the objectors were asked by the Court to minimize cumulative testimony and evidence, they were not prohibited from presenting any witness that they called to testify. After the last witness was presented, the Court heard no objection to taking the case under submission. There was no request by any class member or attorney to present further testimony or to continue the hearing until another day. Under these circumstances, the motions for rehearing are due to be denied. Before doing so, however, the Court is compelled to address several of the

contentions set forth in the post-hearing motions so that the record is not cluttered with unfounded allegations of impropriety.

The post-hearing motion filed by Ralph Coleman on behalf of the thirteen class members he represents raises a number of procedural questions about the fairness of the settlement approval process which has been followed. First, the contention is made that the notice to the class was insufficient because it informed class members that they would have to support any objections to the proposed settlement with evidence which was subject to cross-examination. At the fairness hearing there were no class members who came forward to say that they would have objected to the proposed settlement in the absence of that provision in the notice to the class. Certainly none of Mr. Coleman's clients could have so testified since all of them filed objections. Mr. Coleman has not informed the Court of any identifiable class members who refused to object because of a fear of cross-examination. While the Court is sensitive to any claim that the official notice to the class "chilled" dissent, such a claim must at least be raised by a person who has standing to raise it and be supported by a threshold level of credible proof of the chilling effect. The pending motion filed by Mr. Coleman fails on both counts. It was not filed on behalf of any person who was actually discouraged from objecting by the formal notice and it is not supported by any credible evidence that such a person exists.

Similar to this contention is the allegation that class members were given exaggerated opinions of the monetary value of the proposed settlement in meetings with the class in January of this year. The Court finds that this contention was unsupported by any credible evidence at the fairness hearing. No additional evidence on this subject has been identified to the Court since that hearing. Even if the point were fully supported by the evidence, however, it would not call the fairness of the settlement into question because any exaggerated descriptions of the proposed settlement were cured by the formal notice mailed to the homes of every class member in April. That notice contained an accurate and complete description of the proposed settlement prior to the deadline for objections. There has been no evidence offered of

any class member who misunderstood the terms of the settlement after the formal notice was mailed to their home in early April of this year.

Secondly, the post-hearing motion filed on behalf of the class members represented by Mr. Coleman contends that the fairness hearing was itself unfair because it placed the burden of proof on the objecting class members and because the evidence offered by the proponents of the settlement was in affidavit form. The motion is incorrect in both of these contentions. At every stage of the settlement approval process the Court has imposed the burden on the proponents of the settlement to prove that it is fair, adequate and reasonable. The evidence from the proponents was received by affidavit as the direct testimony of the witnesses, but not as their entire testimony. Each of such witnesses was either present or on call for the purpose of cross-examination. The opponents of the proposed settlement were given as much time to study the affidavits as they requested. The fairness hearing was specifically adjourned for several hours for this purpose. When the hearing reconvened there were no objections made to the use of such affidavits for the purpose of direct examination by any party, class member or attorney. Neither was there any effort at cross-examination of such witnesses. The opponents of the settlement were represented by licensed attorneys and did not appear *pro se*. The Court cannot attribute the failure to object to the receipt of the affidavits of the proponents' witnesses to anything other than a knowing decision by such attorneys to allow such affidavits to be received as evidence without need of cross-examination of the affiants. It is now entirely too late for the opponents to complain about the use of affidavits. The expert witnesses retained by the parties are from North Carolina and Texas. The opponents' failure to attempt cross-examination at the fairness hearing or at a deposition prior to or since such hearing can only be cured at great expense in time and money at this late date. The opponents of the settlement represented by Mr. Coleman have failed to show any justification for reopening the record to do that which should have been done at the original fairness hearing.

The motion for rehearing filed by Ronald Spratt on behalf of

the class members he represents contends that the Court "limited testimony by the objectors" at the May 12, 1983 hearing. The motion fails to identify any witnesses who were present at the hearing who were not allowed to testify. It also does not describe what additional evidence might be offered so that the Court can evaluate whether it would be admissible or helpful on the issues at hand. Most, if not all, of the testimony presented by the objectors at the May 12, 1983 hearing did not focus on the issues relevant to a determination of whether the settlement should be approved. The Court pointed this out to the attorneys for the objectors several times during the hearing, but they continued to put on evidence which had only a marginal relevance. The Court is unwilling to exercise its discretion to reopen the evidentiary record without a specific identification of the evidence that would be offered at such a rehearing.

In addition, the opponents of the settlement failed to object to the Court taking the case under submission on May 12, 1983. After the last witness was called by the opponents there was no request for further opportunity to present evidence or to make arguments. At some stage the proceedings in this case must come to an end and not be subject to repeated efforts to delay the entry of a final judgment that will allow the class to receive the back-pay to which they were held entitled almost ten years ago. The Court is firmly convinced that all of the parties and class members have been given an ample opportunity to present the evidence that is available on the question of the fairness of the proposed settlement. Accordingly, the motions for rehearing filed by the opponents are denied. A separate Order will be entered on such motions.

IV. THE RIGHT TO OPT-OUT

One final contention which was raised during the fairness hearing remains to be considered. The testimony presented by the opponents attempted to fault the class representatives and attorney for informing them that they could seek to opt-out of the settlement and attempt to prove entitlement to a larger back-pay award. The contention is made that this constituted a "threat" which "improperly restrained" class members from objecting.

This contention reflects a misunderstanding of the law of the case and the duty of the attorney for the class.

In *Pettway IV* the Court of Appeals considered the question of opting out at some length. It concluded with a statement that "on remand if another settlement is reached, the district court should provide those claimants who decide to opt-out of the settlement with an opportunity to assert their individual claims in this action." *Id.* 576 F.2d at 1220. The attorney for the class brought this provision of the prior mandates to the attention of the class in his meetings with them in January, February, March and April of this year. It is undisputed that he informed class members in all of these meetings that he would assist them in seeking to opt-out of the settlement if they desired the opportunity to present their individual claims for greater back-pay. After formal notice to the class was mailed to each class member, the plaintiffs' attorney met individually with scores of class members in his office prior to the May 12, 1983 fairness hearing. In these meetings the opportunity to opt-out was once again explained to the class members, including many of the ones now objecting to the proposed settlement. Presumably the attorneys for the objectors also read the mandate in *Pettway IV* and informed their clients of the opportunity to opt-out of the settlement and proceed individually with a claim for a greater back-pay award.

Despite the repeated notice to the class of the opportunity to opt-out of the settlement there has not been a single request to do so by any member of the class. Instead, the objecting class members have apparently decided that the opportunity to opt-out is something that is not in their best interests. According to the papers before the Court and the testimony, this decision was made with the advice and counsel of the objectors' attorneys.

The Court and the class representatives, of course, cannot force the objecting class members to seek the opportunity to opt-out of the settlement and pursue their individual claim of entitlement to more back-pay. The decision in *Pettway IV* only mentions the "opportunity" to opt-out of the settlement. In the circumstances now before the Court that opportunity has been provided and no class member has expressed any interest in it. In

the absence of any request to opt-out and any objection based on this ground, the Court concludes that the issue is moot.

V. ATTORNEY AND EXPERT FEES

The Notice to the class fully described the amount of fees and expenses which are scheduled to be paid to the attorney and the expert for the class. Only two objections have mentioned the reasonableness of the attorney's fees and none have mentioned the reasonableness of the expert witness fees or the attorney's expenses. The two objections which mentioned the attorney's fees stated that they were contingent upon a showing of reasonableness. At the fairness hearing on May 12, 1983 the Court received evidence from the plaintiffs concerning the reasonableness of the fees provided in the proposed settlement. The opponents of the settlement declined to present any evidence on the issue. Even in their arguments to the Court at the hearing, the objecting class members and their attorneys did not oppose the attorney's fees provided in the proposed settlement. The two class members who mentioned the attorney's fees in their written objections prior to the hearing did not express such objections or offer anything in support of them at the hearing.

Nevertheless, the Court is aware of its own independent obligation to consider the reasonableness of the attorney's fees and expert witness fees provided in the proposed settlement. The Court has received testimony from the plaintiffs' attorney and two additional attorneys who are well respected for their knowledge and expertise in litigation in this District. This testimony was received as evidence in the form of affidavits without objection from any party or class member. The opponents of the settlement declined the opportunity to cross-examine such witnesses.

The Court examined the reasonableness of attorney's fees prior to giving preliminary approval to the proposed settlement. See Findings Of Fact And Conclusions Of Law Giving Preliminary Approval To Proposed Consent Decree, pp. 17-23 (entered March 23, 1983). The Court now has before it additional evidence on the subject. Based on all of the evidence and the Court's own independent knowledge of the efforts of the attorney

for the class, the Court finds that each of the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), support a finding that the attorney's fees requested by the plaintiff's attorney are reasonable. More specifically, as to each of the twelve *Johnson, supra*, factors, the Court finds:

1. *Novelty and Difficulty:* This case has involved a series of novel and difficult legal and factual issues throughout the eight years that the plaintiffs' attorney has devoted to prosecution of the back-pay claims of the class. Many of the issues that have been resolved in this case have been ones of first impression and have resulted in a suibstantial body of precedent for guidance of future cases.

2. *Skill Requisite To Perform The Legal Services Properly:* The proper representation of the class in this case has required a high degree of skill and effort at both the trial and appellate levels.

3. *Experience, Reputation And Ability Of The Plaintiffs' Attorney:* While the plaintiffs' attorney had very little experience or reputation at the beginning of his representation of the plaintiffs, he has gradually gained a great deal of experience and ability in this area of the law since 1975. The great majority of the work for which he is currently being compensated involves the 1980-1983 period of time. During that period the plaintiffs' attorney has been one of the most experienced and able practitioners on the plaintiffs' side of Title VII cases in this District. The Court of Appeals in *Johnson, supra* at 719, recognized that "(a)n attorney specializing in civil rights cases may enjoy a higher rate for his expertise than others, providing his ability corresponds with his experience." The ability displayed in this case has been commendable.

4. *Amount Involved and Results Obtained:* The amount involved in the case is substantial for this area of the law and this District. The results obtained are in every sense impressive and accord important remedies to a large class of black employees.

5. *The Customary Fee:* The lead attorneys for the defendant have charged between $90 and $100 per hour for the work they

have done on a non-contingent basis for the defendant in the last three years in this case. The evidence before the Court indicates that such rates are customary in this Distict for non-contingent work of the type involved in this case since 1980.

6. *The Contingency Of The Fee:* The plaintiffs' attorney has prosecuted this case on the basis of a fee that was contingent on success and court approval. Since the remand in *Pettway IV*, *supra*, and the entry of the injunctive Consent Decree in 1980, the Company has taken the position that an award of further attorney's fees was contingent upon continued success on the remaining claims in the case. Throughout his representation of the class since 1975 the plaintiffs' attorney has been exposed to the substantial risk of receiving nothing for his time and services.

7. *Preclusion Of Other Employment:* The number of hours and the priority which has had to be given to this case because of its age has foreclosed more than half of the time available for work on the affairs of other clients during the last three years. Because of this fact, the plaintiffs' attorney has had to turn down and transfer a substantial amount of other business which could have provided him a more secure and predictable income.

8. *Time Limitations Imposed By The Client And The Circumstances:* The plaintiffs' attorney has had to work under very tight time constraints at numerous points of the last three years. While the case has appeared to drag very slowly at times, that has only been because of the immense amount of work that has gone into the case. Beginning in July, 1980 this Court and the Court of Appeals have expedited the processing of the case and placed short deadlines on virtually every aspect of the case. The decision in *Johnson*, *supra* at 718, states that "(p)riority work that delays the lawyer's other legal work is entitled to some premium. This factor is particularly important when a new counsel is called into prosecute the appeal or handle other matters at a late stage in the proceedings." *Id.* That factor is fully applicable to the work at bar.

9. *Nature And Length Of Professional Relationship With Client:* The class in this case is large and, at times, very vocal as to how it desires this case to be handled. The nature and length of

the relationship between the attorney for the class and the class itself has necessarily presented difficulties and aggravations which are not associated with providing more routine or traditional legal services.

10. *Time And Labor Required:* The plaintiffs' attorney expended 3,508 hours in the prosecution of the monetary claims of the class prior to January 10, 1983. The contemporaneous time records kept by him were made available during the fairness hearing on May 12, 1983. Neither the attorneys nor any class members who attended that hearing expressed any doubt as to the reasonableness of any of the hours recorded in such time records. There has been no duplication of work on behalf of the plaintiffs. The plaintiffs' attorney, Robert L. Wiggins, Jr., has been the only attorney who has worked on this case for the plaintiff class since 1975. All of the 3,508 hours for which he is being compensated were expended on the monetary claims of the class and not on any claims on which the plaintiffs were ultimately unsuccessful. The Court has carefully considered the recorded hours and has not been able to identify any which were unreasonably or unproductively expended. See generally, *Fitzpatrick v. Internal Revenue Service*, 665 F.2d 327 (11th Cir. 1982). The Court finds that all of these hours were reasonably spent in the prosecution of the plaintiffs' back-pay claims. Among other facts which support this finding, the Court notes that the defendant's attorneys spent a comparable number of hours on this case during the same period of time.

11. *Undesirability Of The Case:* Based on all of the circumstances surrounding this case since June, 1975, the Court finds that it was a highly undesirable undertaking which very few attorneys would have accepted. The acceptance of this case had a negative effect on the practice of the plaintiffs' attorney. The delay of eight years in receipt of payment for his services has also contributed to its undesirable character.

12. *Award In Similar Cases:* There are very few cases similar to the one now before the Court. In one recent individual Title VII action which lasted less than two years, another judge of this District awarded the current plaintiffs' attorney $90 per hour and

then doubled the fee because of the applicability of several of the *Johnson, supra,* factors. *Davis v. Construction Materials, Inc.,* CV# 81-C-1816-S (N.D. Ala. 1982). In two other cases in this District the court has awarded $85.00 per hour and 10% of the total recovery of the class to the plaintiff's attorney. *Harper v. Federal Deposit Insurance Corp.,* CV# 79-HM-0921-S; *South v. C. J. Hughes,* CV# 80-HM-0397-S. See also, *Neely v. City of Grenada,* 624 F.2d 547, 551 (5th Cir. 1980). The Court finds that the fee involved in the proposed settlement is less than what might have been awarded in comparable cases that did not involve a settlement. It is also less than what the defendant has paid its own attorneys in this case.

The Court concludes that this is a case in which the plaintiffs' attorney is entitled to some premium or enhancement of the fee that he normally would be entitled to receive in less exceptional circumstances. While the Court believes that all of the twelve *Johnson, supra,* factors support some degree of enhancement, the Court is particularly impressed with the amount involved and the results obtained for the plaintiff class. See e.g., *Neely v. City of Grenada, supra* at 551. As the Supreme Court has recently recognized, "in some cases of exceptional success an enhanced award may be justified." *Hensley v. Eckerhart,* Slip Op. (May 16, 1983). The history of this lawsuit certainly marks it as one involving "exceptional success."

Based on all of the foregoing factors, the Court finds that the attorney's fee and expenses set forth in the proposed Consent Decree are reasonable for the period through January 10, 1983. In reaching this finding the Court has reviewed the findings of fact and conclusions of law entered in support of preliminary approval of the attorney's fees on March 23, 1983. Those findings and conclusions are fully supported by the evidence presented at the May 12, 1983 hearing. The Court adopts and reaffirms such findings and conclusions in support of the attorney's fee award.

In addition, the amount of fees set forth in the proposed Consent Decree did not include any compensation for the period since January 10, 1983. The plaintiffs' attorney has expended 392 hours in representing the class in gaining approval of the

proposed settlement and in otherwise fulfilling his obligations to the class on the monetary relief aspects of this case. The Court finds that these hours were both necessary and reasonable and that the attorney for the class should be compensated for them in the amount of $100 per hour. Such fees will be paid in accordance with the provisions of ¶ 7 and ¶ 12 of the proposed Consent Decree. The plaintiffs' attorney is entitled to be compensated for all hours reasonably expended by him between June 22, 1983 and the date that the back-pay is distributed to the members of the class. Plaintiffs' attorney shall, prior to the distribution of the monetary sums set forth in the Consent Decree, provide the Court with a summary of the hours expended since June 22, 1983. Such payment shall also be at the rate of $100 per hour and shall be paid from the funds provided in § 12 of the proposed settlement.

CONCLUSION

The Court has carefully considered the terms of the proposed settlement in light of all the evidence, arguments, and previous decisions which have been entered in this action. The Court finds that the parties have carried their burden of proving that all of the terms and provisions of the settlement are within the range of what could have reasonably been expected to have been recoverd at trial. The Court also finds that the class representatives and the attorney for the class have provided adequate representation of the interests of every member of the class and that the settlement is a fair, adequate and reasonable disposition of the claims of each segment of the class.

DONE this 23rd day of June, 1983.

Seybourn H. Lynne
United States District Judge

PETTWAY v. AMERICAN CAST IRON PIPE CO.

Rush PETTWAY, et al.,
Plaintiffs-Appellees,

Charles L. Daniel, et al.,
Plaintiffs-Appellants,

and

United States Equal Employment Opportunity Commission,
Plaintiff-Intervenor-Appellee,

v.

AMERICAN CAST IRON PIPE COMPANY
Defendant-Appellee.

No. 83-7425
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Nov. 21, 1983.

Black employees brought class action alleging employment discrimination. The District Court, 332 F.Supp. 811, found racial discrimination, but declined to find any damages, and the Court of Appeals, 494 F.2d 211, remanded for determination of back pay, and thereafter denied rehearing, 494 F.2d 1296. Following remand, the District Court approved proposed settlement and overruled motions by dissatisfied class members, and the Court of Appeals, 576 F.2d 1157, affirmed in part, reversed in part, and remanded. The Court of Appeals, 581 F.2d. 267, denied rehearing en banc, and the Supreme Court, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74, denied certiorari. On remand, the District Court ordered special master to proceed with determination of back pay on individual-by-individual basis, but the Court of Appeals, 681 F.2d 1259, vacated and remanded, encouraging further effort at settlement. The United States District Court for the Northern District of Alabama, Seybourn H. Lynne, J., approved settlement agreement, and 58 dissatisfied class members appealed. The Court of Appeals held that

evidence supported finding that 58 dissatisfied members of class were treated fairly and received amounts to which they were entitled in settlement of back pay claim.

Affirmed.

Federal Civil Procedure 1699

In class action alleging racial discrimination in employment, evidence supported finding that 58 dissatisfied members of class were treated fairly and received amounts to which they were entitled in settlement of back pay claim.

Appeals from the United States District Court for the Northern District of Alabama.

Before RONEY and CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

This is the sixth appearance of this case before this Court and its predecessor, the Court of Appeals for the Fifth Circuit. The belabored history of the litigation is fully stated in its last previous appearance here, *Pettway, et al. v. American Cast Iron Pipe Co.*, 681 F.2d 1259 (11th Cir. 1983). Very briefly stated, the history encompassed the following steps. Originally the trial court found the existence of racial discrimination in the employment and promotion practices of the defendant. The court granted an injunction and then declined to find any damages in favor of the plaintiff class. Upon appeal, this Court remanded for a determination of back pay, 494 F.2d 211, leaving open, of course, the possibility of a settlement between the parties. Such a proposed settlement was recommended by the class representatives and their counsel, in a sum amounting to approximately $1,000,000. Because of the objection of some seventy percent of the members of the class, and other defects found by this Court to have occurred in the trial court's approval of such settlement, this Court again reversed and remanded the case for further proceedings. A substantial number of the members of the class had accepted checks mailed out by the

defendant in accordance with the proposed settlement. Because the trial court announced its intention of requiring proof by every member of the class of his own amount of back pay to which he considered himself entitled, this Court again reversed and directed that the court determine whether it could not estimate a back pay award due to the class as a whole. Again, this Court at 681 F.2d 1259, encouraged a further effort at settlement. Settlement efforts finally succeeded and after due hearing upon the recommendation of the class counsel, more than 95 percent of the members of the class, with the concurrence of the Equal Employment Opportunity Commission, approved the settlement. Now, 58 members of the class, filed these appeals.

The principal argument presented by the present appellants is that they did not receive amounts in the proposed distribution equal to comparable members of the class. In effect, they contend they should not be required to include as part of their final award, the amount of the checks they cashed in 1975. With evidence at the fairness hearing of the current value of the 1975 payments to these employees, the court could properly conclude that the parties were treated fairly.

We have carefully considered the record of the fairness hearing conducted by the trial court, and the court's full discussion of each issue raised at the hearing. As stated by the court at the conclusion of the hearing, the court had been aware of the many issues in the case for a period of 17 years, and it showed itself to be completely aware of the relatively small number of objectors who made competing claims as to the amounts they should have received in the final settlement.

We find that the trial court had before it more than sufficient evidence upon which it could, as it did, conclude that the settlement was "fair and reasonable."

We particularly note that, once all of the legal complications in the case had finally been disposed of, during the many trips of this case to the courts of appeals of this and the Fifth Circuit, the trial court demonstrated unusual skill in apprehending each nuance that was even suggested by the present objectors, the appellants here. We conclude that the final determination of the trial court,

bolstered to some extent by the agreement, though without the signature, of the Equal Employment Opportunity Commission, cannot be faulted as having been an abuse of the trial court's discretion.

All pending motions, not individually acted on, are hereby denied.

The judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7425

Rush PETTWAY, et al.,
Plaintiffs-Appellees,

Charles L. Daniel, et al.,
Plaintiffs-Appellants,

and

United States Equal Employment
Opportunity Commission,
Plaintiff-Intervenor-Appellee,

v.

AMERICAN CAST IRON PIPE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 21, 1983, 11 Cir., 198 , F.2d).

Before RONEY and CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the court having requested that the Court be polled on rehearing en blanc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Paul H. Roney
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION NO. 66-315

RUSH PETTWAY, et al.,
Plaintiffs,

v.

AMERICAN CAST IRON PIPE COMPANY
Defendant.

SUPPLEMENTAL AFFIDAVIT OF ROBERT L. WIGGINS, JR.

STATE OF ALABAMA)
JEFFERSON COUNTY)

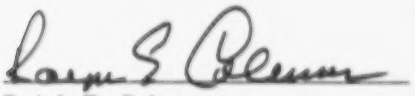
Comes Robert L. Wiggins, Jr. who, first being duly sworn proposes and states as follows:

1. Since January 10, 1983 I have expended 392 hours in representing the class in obtaining the monetary relief provided for in the Consent Decree and in securing the agreement of the class with such settlement. The hours spent by me on the monetary remedies obtained in this case since January 10, 1983 were maintained on contemporaneous time records. The time which was recorded on the contemporaneous time records since January 10, 1983 is summarized on the attached itemization of time. The attached itemization is an accurate summary of the time spent by me since January 10, 1983 on the monetary relief obtained for the class.

Robert L. Wiggins, Jr.
Attorney for Plaintiffs
Suite 716 Brown Marx Building
Birmingham, Alabama 35203

April 17, 1983	Prepare and attend meeting with CEJO and class at St. Paul's	5.8
April 18, 1983	Meet with class members; draft letter to Supreme Court on extension of Petition For Cert.	8.0
April 19, 1983	Meet with class members on settlement all day; draft letters to class members calling on telephone	9.8
April 22, 1983	Meet with class members; review status of objections at Courthouse; talk to Logan on telephone; meet with Bates on objections	5.0
April 26, 1983	Review objections and draft joint motion to require disclosure of facts by objectors; draft letter to Logan summarizing objections by categories—5 page letter	4.8
April 27, 1983	Meet with class members all morning on settlement; prepare and meet with Pat Logan on approach to objections; meet with class members; draft objection to Petition to change LOP's	10.9
April 28, 1983	Meet with class members all morning; meet with class members all afternoon; meet with Booker, Henley and Blackmon on objections	10.6
April 29, 1983	Meet with class members all morning	4.0
April 30, 1983	Meet with class members all day	7.8

Respectfully submitted,



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NO. 83-1802

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

CHARLES L. DANIEL, et al.,
Petitioners

vs.

RUSH PETTWAY, et al.,
Respondents,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.
AMERICAN CAST IRON PIPE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT L. WIGGINS, JR.
Suite 716 Brown Marx Building
2000 1st Avenue North
Birmingham, Alabama 35203
(205) 252-4065

Attorney for Rush Pettway and the Plaintiff Class as Respondents.

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NO. 83-1802

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CHARLES L. DANIEL, et al.,
Petitioners

vs.

RUSH PETTWAY, et al.,
Respondents,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.
AMERICAN CAST IRON PIPE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF CASE

The plaintiff class has reviewed the Statement of the Case filed by the Company as a part of its Brief In Opposition to the Petition and has found it to be an accurate rendition of the current status of this case. The plaintiff class hereby

adopts the Respondent Company's Statement of the Case in its entirety. On the other hand, the plaintiff class has found the Petitioner's Statement of the Case to be completely unreliable and untrustworthy. For this reason, the plaintiff class provides a supplemental Statement of the Case.

In 1974 the Court of Appeals for the Fifth Circuit reviewed the difficulties of calculating back-pay for the class in this case and stated that "the parties may also consider negotiating a settlement. An alternative is to utilize the expertise of the intervening Equal Employment Opportunity Commission to supervise settlement negotiations or to aid in determining the amount of the award". *Pettway III, supra* at 258. Four years later in the fourth appellate review of this action, the Court once again encouraged settlement of the back-pay issue.

> We hope that the parties will be able to settle their differences on remand. In their briefs appellants remark that perhaps an agreeable settlement could be worked out if they were given the opportunity to develop the facts through discovery. The district court on remand should consider this possibility for resolving the dispute. Of course, the scope of the discovery to be conducted in each case rests with the sound discretion of the trial judge.

Pettway IV, 576 F.2d at 1218 n.76.

On remand from *Pettway IV,* the parties engaged in extensive negotiations throughout 1979 and the first half of 1980 concerning the injunctive aspects of this litigation. These negotiations resulted in an injunctive Consent Decree which was approved by the district court in July, 1980 after notice to the class and a fairness hearing. (App. 5-7). In approving this Consent Decree, the district court strongly urged the parties to undertake negotiations on the monetary issues which were not resolved in the 1980 Consent

Decree. (App. 5-6). Between July, 1980 and July, 1981 the parties engaged in extensive formal and informal discovery and periodically attempted to negotiate a settlement of the monetary issues. These efforts were reviewed and discussed by the Court of Appeals for the Eleventh Circuit in *Pettway v. American Cast Iron Pipe Co.*, 681 F.2d 1259, 1262-1263 (11th Cir. 1982) (*"Pettway V"*). They were also the subject of more detailed findings of fact by the district court on remand from *Pettway V*. (App. 7-8).

On remand from *Pettway V*, the parties finally reached an agreement on the amount and distribution of the monetary relief owed to the class. This was accomplished only after extensive arms - length negotiations. The parties submitted the terms and conditions of the proposed settlement to the district court on January 19, 1983. (R. 141). The parties explained the proposed settlement to the district judge in detail and answered an extensive number of questions directed by him. (Tr. 4, 6, 116). The district court instructed the parties on what proceedings he expected to be followed in giving notice to the class and otherwise satisfying the obligations of F. R. Civ. P. 23 (e). The parties were also instructed to draft the formal papers needed to present the settlement for preliminary approval. Between early January and early March 1983 the parties conferred together and jointly drafted the various motions, notices and schedules necessary to present the settlement to the district court for preliminary approval. These papers are found at pages 29 - 99 of Volume 1 of the Record. After these papers were forwarded to the district court, the parties were once again summoned to appear before the district court for the purpose of answering questions concerning the process of negotiations and the terms of the proposed settlement. (Tr. 4, 6, 116). After hearing from the parties further, the district court entered an Order Conditionally

Approving Settlement Class and Tentatively Approving Consent Decree. (R. 95-99). The district court also entered Findings of Fact and Conclusions of Law in which it carefully set down the reasons that preliminary approval of the proposed Consent Decree was given.[1] (R. 6-28).

Pursuant to the district court's Order giving conditional approval to the proposed settlement, the parties mailed a Notice of Hearing on Proposed Settlement of Class Action to the homes of over 2700 members of the class by registered mail with return receipt requested. (R. 55-95; Tr. 7-8; Def. Ex. # 1-4). The settlement also received a considerable amount of publicity in the local news. None of the Petitioners to this Court have claimed that they or any other member of the class failed to receive such notice. The notice to the class informed each class member of the history of the case, the terms of the proposed settlement, and the date and time for filing objections and attending a hearing on such objections. (R. 55-95). Of the 2700 members of the class given formal notice, only 110 members of the class filed objections to the settlement. (Tr. 4). After the hearing of May 12, 1983, 54 of these objectors withdrew their objections. Only 58 class members joined in an appeal to the Eleventh Circuit in opposition to the settlement. (R. 199-200).

As announced in the Notice to the class, a hearing on the fairness of the proposed settlement was held. The parties presented evidence in support of the proposed settlement

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[1]The facts presented to the district court in March prior to preliminary approval of the settlement were acknowledged by the district court to be contained in Plaintiffs' Exhibit #1 at the May 12, 1983 hearing. (Tr. 6-7). The Petitioners have failed to include the March, 1983 Findings of Fact and Conclusions of Law in the Appendix to their Petition. The latter Findings and Conclusions were incorporated by reference into the Findings that gave final approval to the settlement. For this reason, the Petitioners have failed to include all of the Findings of Fact entered by the district court which directly bear on the issues raised by their Petition.

by way of affidavits.[2] Such affidavits incorporated the direct testimony of the expert who did the back-pay calculations for the Company, the plaintiffs' attorney, two independent attorneys and several Company clerks and paralegals. (Pl. Ex. # 1; Def. Ex. # 1-5).

Contrary to the representations of the Petitioners in their Petition, such affidavits were received in evidence at the hearing *without objection* by any party, class member or attorney. During the fairness hearing on May 12, 1983 the parties had their respective affidavits marked as Exhibits and offered them into evidence. (Tr. 5-8). One attorney for the objector-petitioners objected to their being used before he had had a chance to read the affidavits and he was granted a three hour recess for that purpose. (Tr. 8). There was no objection to their receipt as evidence after he had read them, however. The district court stated before the recess that during the recess he was going to "read everything that's been offered in evidence in the case so that [after the recess he] will have had an opportunity to review all of the documents that *have been admitted in*

[2]In using affidavits as the direct examination of witnesses at the fairness hearing, the parties followed the procedures established in a number of prior cases. See e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2nd Cir. 1982) (". . . our own examination of the record leads us to conclude that the court had before it sufficient materials to evaluate the settlement and came to the correct conclusion. Both the defendants and plaintiffs . . . submitted lengthy affidavits to the district court".). *United States v. City of Miami, Fla.*, 664 F.2d 435, 441 (5th Cir. 1981) ("This requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of record, whether established by evidence, affidavit, or stipulation".); *In Re Chicken Antitrust Litigation*, 669 F.2d 228, 233 n.8 (5th Cir. 1982) (Unit B panel relies on affidavit from attorney for the class in affirming approval of class action settlement.); *Miller v. Republic National Life Ins. Co.*, 559 F.2d 426, 429 (5th Cir. 1977) (Affirms approval of settlement based on affidavits from plaintiffs' attorney.); *Hill v. Art Rice Realty Co.*, 66 FRD 449 (N.D. Ala. 1974); *aff'd*, 511 F.2d 1400 (5th Cir. 1975) (Affidavits submitted on behalf of proponents together with prior pleadings and discovery were sufficient factual basis for approval of settlement.); *Williams v. City of New Orleans*, 543 F. Supp. 662, 673 (E.D. La. 1982).

evidence. . . ." (Tr. 9-10) (emphasis supplied). After the recess the district court announced:

> THE COURT: Let the record show that I have read and considered all of the exhibits. I notice that on page 11 of Bob Wiggins' affidavit, there is a typographical error with the word 'July 1984' — certainly intended to be some other year, you might check that.
>
> MR. WIGGINS: Should be 1982. (Tr. 11).

The objector-petitioners never interposed any objection to the affidavits thereafter. *Id.* Nor did they ever request to cross-examine the affiants. *Id.* At the conclusion of the hearing the district court made clear that he had "read very carefully the affidavits submitted by Mr. Wiggins. . . .". (Tr. 117). It went on to make specific findings of fact based on the "expert witnesses" presented by the parties. (Tr. 118-119). Since the testimony of the "expert witnesses" was registered solely in the affidavits submitted by the parties, it is clear that those affidavits were admitted into evidence by the district court. Ten days after the hearing, the objector-petitioners filed a Motion For New Trial in which they asserted for the first time that they objected to the district court "*accepting affidavits* as to the adequacy of the proposed settlement". (R. 132) (emphasis supplied). They also complained for the first time about "not being able to cross-examine the persons purportedly testifying that the settlement was adequate, fair and reasonable". (R. 132). In denying the Motion For New Trial, the district court left no doubt that it had received the affidavits into evidence and that the objector-petitioners had failed to object to the use of the affidavits or to request to cross-examine the affiants. (App. 27-28).

> At every stage of the settlement approval process the Court has imposed the burden on the proponents of the settlement to prove that it is fair, adequate and

reasonable. The evidence from the proponents was received by affidavits as the direct testimony of the witnesses, but not as their entire testimony. Each of such witnesses was either present or on call for the purpose of cross-examination. The opponents of the proposed settlement were given as much time to study the affidavits as they requested. The fairness hearing was specifically adjourned for several hours for this purpose. When the hearing reconvened there were no objections made to the use of such affidavits for the purpose of direct examination by any party, class member or attorney. Neither was there any effort at cross-examination of such witnesses. The opponents of the settlement were represented by licensed attorneys and did not appear *pro se*. The Court cannot attribute the failure to object to the receipt of the affidavits of the proponents' witnesses to anything other than a knowing decision by such attorneys to allow such affidavits to be received as evidence without need of cross-examination of the affiants. It is now entirely too late for the opponents to complain about the use of affidavits. The expert witnesses retained by the parties are from North Carolina and Texas. The opponents' failure to attempt cross-examination at the fairness hearing or at a deposition prior to or since such hearing can only be cured at great expense in time and money at this late date. The opponents of the settlement represented by Mr. Coleman have failed to show any justification for reopening the record to do that which should have been done at the original fairness hearing. (App. 27-28).

After the proponents of the settlement presented evidence in support of the settlement, the Petitioners were given a full opportunity to present whatever evidence they desired. (Tr. 25-114). They presented ten witnesses. *Id.* After the last witness was heard, they did not offer any other evidence. (Tr. 115). Neither did they request a continuance for the purpose of presenting further evidence. *Id.* The first time that the Petitioners ever contended that they

had further evidence to present was ten days *after* entry of the Final Judgment approving the settlement.[3] The district court refused to hear further evidence for the following reasons:

> At this late stage of the case, the Court can find no justifiable reason for allowing class members to raise matters which should have been presented prior to the fairness hearing and the April 22, 1983 deadline for objections. Under even the most liberal reading of Rule 59, the movants have failed to demonstrate any evidence which is newly discovered or could not have been presented at the May 12, 1983 hearing. Indeed, the movants have failed to even articulate what additional evidence they would present at any rehearing. The Court gave the objecting class members a full opportunity to present any evidence which they considered relevant to the issue of whether the proposed settlement should be approved. Although the attorneys for the objectors were asked by the Court to minimize cumulative testimony and evidence, they were not prohibited from presenting any witness that they called to testify. After the last witness was presented, the Court heard no objection to taking the case under submission. There was no request by any class mem-

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[3]The objectors have not shown any prejudice which they suffered as a result of any evidentiary ruling of the district court. An examination of the transcript of the hearing shows that the *proponents'* examination of witnesses was restricted by the court below far more frequently than the objectors. (Tr. 38-39, 47, 52-55, 102-105). The district court was well within its discretion in shaping the scope of the hearing to what it needed to assess the fairness of the settlement. *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("However, this is not to say that the trial judge is required to open to question and debate every provision of the proposed compromise. The growing rule is that the trial court may limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision".); *Mendoza v. United States*, 632 F.2d 1338, 1344 (9th Cir. 1980) ("Broad discretion is granted to the trial judge, enabling him or her to respond fluidly to the varying needs of particular cases. ••• Thus, in examining the accommodation afforded [the objectors], we are for the most part reviewing the district court's choices of how the required procedures were to be implemented".).

ber or attorney to present further testimony or to continue the hearing until another day.

• • •

The motion for rehearing filed by Ronald Spratt on behalf of the class members he represents contends that the Court 'limited testimony by the objectors' at the May 12, 1983 hearing. The motion fails to identify any witnesses who were present at the hearing who were not allowed to testify. It also does not describe what additional evidence might be offered so that the Court can evaluate whether it would be admissible or helpful on the issues at hand. Most, if not all, of the testimony presented by the objectors at the May 12, 1983 hearing did not focus on the issues relevant to a determination of whether the settlement should be approved. The Court pointed this out to the attorneys for the objectors several times during the hearing, but they continued to put on evidence which had only a marginal relevance. The Court is unwilling to exercise its discretion to reopen the evidentiary record without a specific identification of the evidence that would be offered at such a hearing. (App. 25-28).

At the conclusion of all of the evidence, the district court discussed the reasons which supported approval of the settlement. (Tr. 115-119). It also requested the attorneys for the parties to prepare proposed findings of fact and conclusions of law consistent with the Court's own expression of its views on the fairness, adequacy and reasonableness of the settlement. Before such findings were prepared, the objector-petitioners filed motions for new trial which suspended the time for appeal. Six weeks after the hearing on May 12, 1983 the district court entered Findings of Fact and Conclusions of Law which approved the settlement and denied the motions for new trial. (App. 3-35). Thereafter, the appeal to the Eleventh Circuit was filed by the objector-petitioners. The only issues included in such appeal concerned the back-pay calculation and settlement. No ques-

tion was raised in the district court or in the Court of Appeals about the attorney's fees, expert witness fees or expenses provided for by the district court. Such fees and expenses were not negotiated simultaneously with the back-pay and the district court exercised its own independent discretion in determining that the fees were reasonable. (R. 185-192, 22-28; Pl. Ex. # 1, pp. 21-25).

Throughout the period since remand from *Pettway V*, the E.E.O.C. has been kept informed of the settlement negotiations between the parties. The Commission's attorneys provided advice and consultation concerning settlements in comparable cases in other areas of the country as well as other technical assistance during the settlement negotiations. Once a tentative agreement was reached in early January, 1983 it was forwarded to the Commission's attorneys assigned to this case and they expressed their approval of its terms and conditions. During the negotiations, the Commission took the position that the plaintiff was adequately represented by the named individual plaintiffs and that its role should be limited to one of advice and consultation rather than that of an active negotiator. After formal notice of the preliminary approval of the settlement was given to all parties in late March of this year, the Commission continued to support the settlement. Representatives from the Commission's Birmingham District Office actively negotiated various dispositions of pending individual charges of class members whose claims may be affected by the classwide settlement. Its attorneys attended the fairness hearing on May 12, 1983 and expressed no reservation whatsoever about the fairness or the adequacy of the settlement. The district court satisfied itself that the "Equal Employment Opportunity Commission as an intervenor in this action has expressed its approval of the proposed settlement". (App. 10). The Commission did not appeal from

the approval of the settlement and argued for affirmance by the Court of Appeals. It is expected to urge denial of the Petition before this Court.

The class representatives and the vast majority of the class determined that the overall settlement fund is fair, adequate and reasonable. (Pl. Ex. # 1, pp. 19-21). The district court also found as a fact that the overall settlement fund is fair, adequate and reasonable. (App. 10-14). Specifically, the district court found:

> A comparison with similar cases is not the only benchmark which indicates the adequacy and reasonableness of the total recovery. The experts for both parties have conducted extensive calculations of back-pay based on differing reconstructions of what would have been expected to occur in employee job movements in the absence of the racial discrimination found in this case. These calculations were done separately by each expert based on a computerized data bank extracted from the employee records of the defendants. The computer print-outs containing the calculations of the plaintiffs' expert were made available to the attorneys for the objectors and to any objector who requested it. Only one of the attorneys for the objectors took advantage of this opportunity and examined the plaintiffs' expert's calculations. None of the objectors did so. The calculations of the opposing experts differ from one another in the method of calculation but, when considered together, demonstrate that the proposed settlement amount is within the range of the total recovery which could be expected to be obtained by the class at trial. (App. 11-14).

The objector-petitioners have not pointed to any of these findings on the fairness of the overall settlement as clearly erroneous. The Findings are fully supported by the Record. The testimony of Dr. Chorush, an expert retained by the Company, was received by the district court in affidavit form. (Def. Ex. # 5). He described the extensive work he

performed in assembling a computerized data base from which classwide calculations of back-pay could be made. (Def. Ex. # 5, pp. 2-4). He also described the methods of calculation of back-pay he considered and eventually used. (Def. Ex. # 5, pp. 5-12). On the basis of these calculations, he testified as follows:

> Nonetheless, when most of these factors are accounted for, a back-pay liability estimate in the range of $2,460,000 to $3,700,000 is, in my opinion, appropriate.
>
> The proposed settlement in this case is $2,864,703 as back-pay and retroactive pensions. If one takes into consideration that approximately $500,000 was paid out by the company in 1975 and is worth about $1,000,000 in 1983 dollars, then the total proposed settlement, from an economic standpoint, has an equivalent value of about $3,800,000.00. That figure is at the upper range of what I have estimated the potential back-pay liability to be. If one does not consider the present value of the 1975 distribution, then the $2.8 million proposed settlement is toward the lower range of what I have estimated the potential back-pay liability to be. However viewed, the proposed class wide settlement of all monetary issues is well within the range of what I would consider fair, adequate and reasonable to the class based upon my calculations and estimates of potential back-pay liability. The proposed settlement is particularly appropriate, in my opinion, if one considers the significant variables not accounted for in my models but which would be critical in any individual determination of potential back-pay liability. (Def. Ex. # 5).

The objector-petitioners did not dispute any aspect of this testimony in the district court. Even though Dr. Chorush was in Birmingham and available to testify at the fairness hearing, the objector-petitioners never requested the opportunity to cross-examine him.

The attorney for the plaintiff class had the opportunity to examine and contest the calculations of Dr. Chorush beginning in September, 1980 when his initial calculations were presented to the plaintiffs. (Pl. Ex. # 1, p. 8). The plaintiffs were dissatisfied with those initial calculations and hired their own expert. (Pl. Ex. # 1, p. 8). Between 1980 and 1982, Dr. David Peterson assembled a computerized data base from the defendant's personnel records and constructed various methods of calculation of back-pay for the plaintiffs. (Pl. Ex. # 1, pp. 9-10). These calculations were used by the plaintiffs as the basis for negotiations with the defendant. As a result of the give and take negotiations and the dialogue which it engendered, the calculations of both parties underwent change during the 1980-1982 period of time. Ultimately, the class representatives formed the judgment that a back-pay recovery of 3 million dollars or more was a valid estimate of the monetary loss to the class in this case. The testimony of the plaintiffs' attorney at the fairness hearing of May 12, 1983 included the following:

> The computerized calculations of the expert retained by the plaintiffs determined the monetary loss to the entire class to be approximately 3.3 million dollars. While this figure could be enlarged by manipulating the method of calculation in various pro-plaintiff ways, such manipulations were not judged by the plaintiffs' attorney to have much chance of court approval. The method of calculation which showed the monetary loss to the class as a result of the unlawful practices of the defendant were determined by the plaintiffs' attorney to be the most defensible for settlement purposes. While a greater amount might have been won at trial based on other methods of calculations, it was also very possible that a lesser amount might have been recovered at trial. For these reasons, the plaintiffs' attorney concluded that the amount provided in back-pay in the proposed Consent Decree was fair, adequate and rea-

sonable for settlement purposes under all of the circumstances of this case. The E.E.O.C. has also independently approved the terms of settlement. (Pl. Ex. # 1, pp. 18-19).

Prior to the fairness hearing on May 12, 1983, the attorneys for the objector-petitioners[4] requested to review the computerized calculations of Dr. Peterson and were allowed to do so. (App. 12; Tr. 10, 64). This inspection occurred on May 11, 1983. (R. 147). The objectors' attorney, however, did not have any "expert"[5] inspect the voluminous computer studies compiled by Dr. Peterson. Neither did it ever request to photocopy any of the documents that they were allowed to inspect despite the fact that they had ample time to do so. The objectors' "expert" admitted that he could not form any opinion as to the fairness of the settlement because he had never inspected any of the computerized documents which support the back-pay calculations. (Tr. 99-104). None of the objector-petitioners ever requested to depose or speak with Dr. Peterson. Neither did they ever request that he be made available for testimony at the May 12, 1983 hearing. *Id.* The testimony of the defendant's expert, Dr. Chorush, and the testimony of the plaintiffs' attorney was believed to be sufficient to establish the fairness, adequacy and reasonableness of the back-pay recovery. The district court, as the finder of fact, agreed and found that the affidavits presented by the plaintiffs and the defendant established that the overall amount of settlement was fair, adequate and reasonable. (Tr. 118-119; App. 11-14). The Court of Appeals concurred and affirmed the district court's findings. (App. 36-39).

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[4]One of the attorneys for the objector-appellants, Ralph Coleman, admitted during the hearing on May 12, 1983 that he was permitted to review the computerized calculations of the plaintiffs' expert. (Tr. 10 & 64).

[5]The plaintiff class does not recognize Fred Johnson as an "expert" and the district court never received his testimony as such. (Tr. 99-104).

REASONS FOR DENYING THE WRIT

Each of the issues raised in the Petition were thoroughly reviewed by the district court and were rejected in detailed findings of fact entered after the close of all of the evidence. (App. 3-35). On appeal, the Petitioners raised the same issues again. After review, the Court of Appeals rejected the Petitioners' arguments and found that the district court did not abuse its discretion in approving the settlement. (App. 36-39). There is nothing raised in the current Petition which even remotely suggests any "special and important" reason for issuance of a writ of certiorari. Sup. Ct. Rule 17.

I. The District Court Finding That The Class Was Adequately Represented Was Not Clearly Erroneous

The district court found that "the class representatives and the attorney for the class have provided adequate representation of the interests of every member of the class. . . ." (App. 35). The objector-petitioners suggest that this finding was clearly erroneous. In doing so they make numerous allegations against the class representatives and the attorney for the class which are false and misleading. The plaintiff class does not believe that all of these allegations deserve reply because they are false on their face.

1. *The Representation Of The Class Was Vigorous And Adequate*

The starting point for analysis of the adequacy of the representation of the class are the terms of the settlement itself. *In Re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 212, 213 (5th Cir. 1981) ("It is ultimately in the settlement terms that the class representatives' judgement and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair,

reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate legal counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance".); *Parker v. Anderson,* 667 F.2d 1204, 1211 (5th Cir. 1982) ("It will follow generally that an attorney who secures and submits a fair and adequate settlement has represented the client class fairly and adequately".). In the current case, the terms of the settlement itself, and the satisfaction of 98% of the class with such terms, is sufficient basis on which to conclude that the trial court did not abuse its discretion in finding that the class was adequately represented. See e.g., *Reed v. General Motors Corp.,* 703 F.2d 170, 175 (5th Cir. 1983) ("That it is the trial judge who can best know how well the class was represented informs the discretion given to him in reviewing proffered settlements under Rule 23".).

Once the district court determines that the class has been adequately represented, it is the burden of the objector-petitioners to convince the appellate court to the contrary. *In Re Chicken Antitrust Litigation,* 669 F.2d 228, 237 (5th Cir. Unit B 1982) ("As to the second prong of our test, it is up to the objectors to point to a trade - off of their rights and actual prejudice. Objectors have failed to present any specific evidence that their interests were unfairly compromised apart from their general complaint that their share of the rewards was unsatisfactory".). The objector-petitioners in the current case have completely failed to satisfy this burden. The evidence below demonstrated that each segment of the class was treated fairly and no actual conflict of interest arose which pitted the interests of one segment of the class against those of another. The district court carefully analyzed each *potential conflict,* before de-

termining that there was no *actual* conflict among any segment of the beneficiaries of the settlement. (R. 4-23). In doing so, the district court was clearly within its discretion and its judgment should not be disturbed. *In Re Chicken Antitrust Litigation, supra* at 236-237 n.15 ("Although there may be the potential for a conflict of interest to arise, it is best to avoid second guessing the judgment of counsel in settlement negotiations absent an actual conflict of interest which renders effective representation impossible".).

2. *There Was No Collusion Between The Attorneys For The Parties*

The objector-petitioners argue that there was collusion among the attorneys for the parties because they wrote letters to one another and conferred together on the papers that were jointly submitted to the district court in support of the settlement. This contention is absurd on its face and was not raised in the trial court. The attorneys for the parties have necessarily corresponded and conferred with one another on literally hundreds of occasions since 1975. A lawsuit cannot progress toward resolution without such contact between the parties, especially during periods of time in which settlement negotiations are taking place and the parties are jointly going through an extensive settlement approval process which requires their joint participation. The plaintiffs are at a complete loss to understand why the objector-petitioners find fault with the proponents of the settlement jointly preparing papers for submission to the court during the settlement approval process. Without such joint submissions it would be impossible for the agreement of the parties to be submitted to the court. The objector-petitioners' argument fails to distinguish between conciliation and collusion. The district court carefully considered the adequacy of the representation of the class prior to giving preliminary and final approval to the Consent

Decree. There is absolutely no basis in the Record of this case to support even a speculative concern about collusion between the parties after seventeen years of vigorous litigation. See e.g., *Armstrong v. Board of School Directors*, 616 F.2d 305, 315 (7th Cir. 1980).

3. *The Class Was Encouraged To Object To The Settlement If They Were Dissatisfied*

The objector-petitioners suggest that the class attorney somehow bullied the plaintiff class into accepting the settlement. The very notion that this particular class could be bullied by the attorney for the class or by the Court is spurious. In 1975 the class spontaneously discharged its original attorney because he would not object to the settlement of the back-pay claims entered that year. Even in the absence of any notice to the class, approximately 70% of the class filed objections to the 1975 settlement and pursued an appeal of the approval of that settlement. *Pettway IV*, *supra* at 1217. Since 1975 the class has been extremely active and has displayed a persistent refusal to be intimidated by anyone or anything, including adverse rulings in the district court. It is impossible to believe that after seventeen years of vigorous opposition to the defendant and the district court's adverse rulings, the class would be cowered into submitting to a settlement which it believed to be against its best interests.

The meagerness of the number of objections from the class also cannot be attributed to any lack of understanding of how to respond to a notice from the Court. Since 1975 the class has repeatedly had to respond to notices from the Court. In November, 1975 the Court sent Notice to the class members requiring them to opt - in to the settlement by a certain date or be deemed to have opted - out. (Supp. R. pp. 417-418). In 1979 over 1200 class members respond-

ed to a notice which required them to individually file a written request to be considered in the back-pay proceedings. (Supp. R., pp. 442-452). In 1980 the class was required to respond to a notice of settlement of the injunctive features of the case. (Supp. R., pp. 453-457). In 1981 the class members were given notice they were required to respond individually to a difficult set of individualized interrogatories and over 900 of them did so. (Supp. R., pp. 460-469). The class in this case has obviously had a wide ranging experience with formal notices from the Court and on every occasion has responded in large numbers with the appropriate papers. In April, 1983, however, less than 5% of the class objected to the current settlement despite the fact that the formal notice to the class gave them detailed instructions on how to object and provided them with a simplified form to fill out to perfect such objections. In addition to the formal notice of their right to object, the class was provided extensive informal notice which encouraged dissatisfied class members to register their objections. (Pl. Ex. # 1, pp. 19-21). Against the background, the approval of the settlement by 95% of the class belies the Petitioners entire argument to this Court concerning the inadequacy of the settlement and the representation of the class.

II. The Objector-Petitioners Waived The Opportunity To Opt-Out

The first time in this case that the objector-petitioners ever sought the opportunity to opt - out of the settlement was in their Brief to the Court of Appeals. In the district court the objectors castigated the attorney for the class because he told them that he would request the opportunity to opt-out for them if they were dissatisfied with the settlement and if they desired to opt - out. (R. 131; Tr. 63-79). The objectors asserted in the district court that they did

not want to opt-out of the settlement. The district court found in this regard that the attorney for the class repeatedly notified the class that he would seek the right to opt - out of the settlement for any class member who was dissatisfied with it. (App. 28-29). Nevertheless, not a single class member ever sought to opt - out of the settlement at any stage of the proceedings in the district court. As a result, the district court concluded that the question of opting - out was a "moot" issue.[6] (App. 29-30).

It is well established that, "[a]s a general principle of appellate review, this court will not consider a legal issue or theory that was not presented to the trial court". *Bliss v. Equitable Life Assur. Soc. of U. S.*, 620 F.2d 65, 70 (5th Cir. 1980). This is especially true in circumstances where the party asserting the new issue took the diametrically opposite position in the trial court. *Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) ("Regardless, the objectors did not mention it in either the written objections or at the fairness hearing. As such, this Court will not consider the issue".). Had the objectors simply listened to the advice of the attorney for the class during the lower court proceedings, they could have sought the opportunity to opt - out in the district court. Instead, with the advice of their current counsel, they attacked the very notion of opting - out in the hope that the class representatives would capitulate to their demands for an unequal share of the settlement proceeds rather than face the delays inherent in an

[6]The district court's treatment of the opt - out issue is consistent with the subsequent decision in *Holmes v. Continental Can Co., Inc.*, 706 F.2d 1144 (11th Cir. 1983). The latter decision plainly states that "certain class members repeatedly attempted to opt - out" of the settlement in the district court. *Id.* at 1151. The Court in *Holmes* also found that "[o]bjectors to this settlement moved in the district court that opt - out procedures be established for class members dissatisfied with the monetary aspects of the proposed settlement". *Id.* at 1152-53. As already discussed, the objectors in the current appeal did just the opposite and disavowed any interest in opting - out in the district court.

appeal of the objections. Once that tactic failed, they now belatedly attempt to return to the possibility of opting - out. This type of manipulation of the remedies available to objecting class members does not merit review by certiorari. It is not unreasonable in a case that has lasted seventeen years to require that objectors make the district court aware of whether they desire to opt - out of the settlement, especially when the objectors are represented by licensed attorneys and a prior mandate in the case has explicitly informed them of the opportunity to opt - out. See *Pettway IV*, 576 F.2d at 1220.

The conscious decision of the objector-petitioners to disavow all interest in opting - out in the district court has completely disrupted the orderly and sensible progression of this case toward a final resolution. The parties to the settlement and the majority of the class have been deprived of the opportunity to enjoy the fruits of the settlement and have been put to great expense in defending this appeal merely so that the objectors can seek a right to opt-out that they expressly disavowed in the lower court. The prejudice to the parties, the class as a whole and the judicial system from such delinquency is sufficient to justify a refusal to allow these class members to opt-out of the settlement at this late date. As the district court found:

> The Court and the class representatives, of course, cannot force the objecting class members to seek the opportunity to opt - out of the settlement and pursue their individual claim of entitlement to more back-pay. The decision in *Pettway IV* only mentions the 'opportunity' to opt - out of the settlement. In the circumstances now before the Court that opportunity has been provided and no class member has expressed any interest in it. In the absence of any request to opt - out and any objection based on this ground, the Court concludes that the issue is moot. (R. 184-185).

In the circumstances of this case, the district court cannot be held to have abused its discretion in so holding and the Court of Appeals recognized as much when it affirmed. There is no reason for this Court to grant certiorari on this issue in view of the unique procedural posture in which the case comes before the Court.

CONCLUSION

This case is not one that should be reviewed by the Court. The District Court and the Court of Appeals painstakingly reviewed the settlement and the representation of the class and found it was fair, adequate and reasonable. There is no conflict among the Circuits in the application of these principles. Neither is there any aspect of the application of these principles in the circumstances of this case which merits any further attention by this Court.

Respectfully submitted,

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(205) 252-4065

NO. 83-1802

IN THE

Supreme Court Of The United States

October Term, 1983

CHARLES L. DANIEL, et al.,
Petitioners

vs.

RUSH PETTWAY, et al.,
Respondents
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent
AMERICAN CAST IRON PIPE COMPANY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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INFORMATION REQUIRED BY RULE 28.1

American Cast Iron Pipe Company, a respondent herein, is a corporation incorporated under the laws of the State of Georgia. American Cast Iron Pipe Company is not a subsidiary of any other company, and all of its subsidiaries are wholly owned.*

*In his List of Parties, counsel for petitioners lists sixty individuals as plaintiffs-appellants in the court below. One person listed, M. L. Walls, withdrew his appeal on May 27, 1983. Two class members, Robert Caldwell and Melvin Carson, have no standing since they did not file any objections in the District Court. Thus, the present petition was filed on behalf of fifty-seven class members, less than 2½% of the plaintiff class, which includes over 2,700 employees.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – (Continued)

NO. 83-1802

IN THE

Supreme Court Of The United States

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CHARLES L. DANIEL, et al.,
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vs.

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AMERICAN CAST IRON PIPE COMPANY,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This race discrimination class action was filed on May 13, 1966 under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. The case has had a long and tortuous history spanning a full trial, an attempted full settlement, four separate appeals to the United States Court of Appeals for the Fifth Circuit, a later settlement of the injunctive aspects of the case, the filing of a petition for writ of mandamus with

the Fifth Circuit, an appeal to the Eleventh Circuit Court of Appeals, the filing of a petition for a writ of certiorari with this Court,[1] and finally, a settlement of the monetary aspects of the case, the subject of the decision below. In the interest of brevity, the prior history will be substantially abbreviated.

After a prior appeal to the United States Court of Appeals for the Fifth Circuit on procedural grounds, *Dent v. St. Louis-San Francisco Railway Co.*, 406 F.2d 399 (5th Cir. 1969) (a consolidated appeal including the *Pettway* case), and an appeal from the discharge of one of the named plaintiffs, *Pettway v. American Cast Iron Pipe Company*, 411 F.2d 998 (5th Cir. 1969), the class action charges were tried in the district court in October, 1971. The district court granted injunctive relief but declined to award any back pay. *Pettway v. American Cast Iron Pipe Company*, 7 FEP 1010 (N.D. Ala. 1972).

On appeal, the Fifth Circuit reversed the judgment of the district court and found that the proper relief on remand should include an award of back pay. *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211 (5th Cir. 1974) (*Pettway* III). The court in *Pettway* III also urged the parties to "consider negotiating an agreement" with respect to back pay. 494 F.2d at 258.

On remand from *Pettway* III, a settlement of the monetary issues was reached, and on June 12, 1975, the district court entered a judgment awarding back pay in the amount of $1,000,000. In *Pettway v. American Cast Iron Pipe Company*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) (*Pettway* IV), the Fifth Circuit again reversed and remanded, holding that the district court's approval of the back pay settlement was an abuse of discretion

[1]The petition is pending, and with the consent of this Court, will not be considered unless the Court reverses the Eleventh Circuit's judgment affirming the district court's approval of the present settlement.

since the active named plaintiffs unanimously disapproved of the settlement and 70% of the back pay subclass also objected. The court again encouraged the parties to reach a settlement. 576 F.2d at 1213.

On remand from *Pettway* IV, the parties settled the injunctive aspects of the case. On July 16, 1980, that consent decree was approved by the district court and entered on the record. In its Findings of Fact and Conclusions of Law entered on July 25, 1980, the district court stated that if the parties could not reach a settlement of the remaining monetary issues, the court would "proceed forthwith with all possible speed to adjudicate the back pay claims of all affected employees." (App. 5). No appeal was taken from the 1980 Consent Decree.

After settlement efforts were unsuccessful, the district court held a hearing with the parties on July 17, 1981, and entered an Order of Referral to Special Master which referred the entire back pay issue for trial on an individual-by-individual basis. On or about August 5, 1981, plaintiffs filed a Petition for Writ of Mandamus attacking the individual-by-individual approach to adjudicating back pay claims at Stage II under the order of reference. Plaintiffs' petition was denied by the Fifth Circuit on August 19, 1981. (App. 8).

On August 19, 1981, plaintiffs also filed a notice of appeal from the Order of Referral to Special Master, raising the same objections to the individual-by-individual approach to adjudicating back pay claims as were previously raised in their Petition for Writ of Mandamus. The Eleventh Circuit accepted the interlocutory appeal and vacated the order of reference. *Pettway v. American Cast Iron Pipe Company*, 681 F.2d 1259 (11th Cir. 1982) (*Pettway* V). The court held, *inter alia*, that a classwide approach to adjudicating back pay claims was required unless the district

court "determines that relief *cannot* be given upon a class-wide basis." 681 F.2d at 1266 (emphasis in original). In a companion case, the EEOC was reinstated as an intervenor in this action. *Pettway and EEOC v. American Cast Iron Pipe Company*, 681 F.2d 1269 (11th Cir. 1982).

The defendant then filed a Petition for Writ of Certiorari with this Court. *American Cast Iron Pipe Company v. Pettway*, No. 82-1074 (1982). The petition is pending, and with the consent of the Court, will not be considered unless the Court reverses the Eleventh Circuit's judgment affirming the district court's approval of the present settlement.

In January, 1983, the attorneys for the parties, after extensive consultations with their respective clients and experts, reached a settlement of all the remaining monetary issues in the case. The agreement reached provides for a total payment from the defendant of $3,983,401.91 in satisfaction of all monetary claims for racial discrimination and fees and expenses which have been asserted as a part of this action. (App. 9).

On March 23, 1983, after reviewing the terms of the proposed Consent Decree, the proposed Notice to be sent to each plaintiff and class member, the applicable law, and arguments of counsel, the district court entered its Order Conditionally Approving Settlement Class and Tentatively Approving Consent Decree. In its Order the court (1) tentatively approved the settlement class as all black employees at defendant's Birmingham, Alabama plant who were employed as of, or hired subsequent to, July 2, 1965 to the present; (2) tentatively approved the proposed Consent Decree based on the findings that (a) there had been a showing that the settlement is fair, reasonable and adequate sufficient to warrant submitting it to the class and (b) the terms of the proposed Consent Decree were reached through extensive arms-length negotiation between the par-

ties. The court also ordered the defendant to send a copy of the approved Notice to each plaintiff and class member. Finally, the district court set a hearing on May 12, 1983 to hear objections to the proposed Consent Decree and to determine whether the proposed Consent Decree should be finally approved. Extensive Findings of Fact and Conclusions of Law were also entered on March 23, 1983, which set forth the court's reasons for giving preliminary approval of the proposed Consent Decree.

Approximately 110 class members, out of a class of over 2,700 employees, and thus less than 5% of the settlement class, filed timely objections to the proposed Consent Decree on or before April 22, 1983. At the fairness hearing held on May 12, 1983, a number of the objectors were represented by their own counsel, and the objectors and their attorneys were given ample opportunity to present objections to the court. (App. 25). On May 12, 1983, precisely seventeen years after the action was filed, the district court entered its Final Judgment and Rule 54 Certificate giving final approval of the proposed Consent Decree tentatively approved on March 23, 1983. (App. 1). On May 23, 1983, some objectors, through their attorneys, filed petitions for rehearing and motions for new trial. Prior to the ruling on the post-trial motions, 10 class members withdrew their objections. The post-trial motions were overruled on June 23, 1983. On June 23, 1983, the district court also entered extensive Findings of Fact and Conclusions of Law in support of his approval of the Consent Decree and in support of his denial of the post-trial motions. (App. 3-35). On July 22, 1983, a notice of appeal was filed on behalf of 58 class members, out of a class of over 2,700 employees. Thus, less than 2½% of the plaintiff class appealed the district court's approval of the settlement.

On appeal, the Eleventh Circuit affirmed the judgment

of the district court approving the settlement. *Pettway v. American Cast Iron Pipe Company*, 721 F.2d 315 (11th Cir. 1983) (App. 36-39). In reaching its holding that the district court did not abuse its discretion in approving the settlement, the court stated:

> We have carefully considered the record of the fairness hearing conducted by the trial court, and the court's full discussion of each issue raised at the hearing. As stated by the court at the conclusion of the hearing, the court had been aware of the many issues in the case for a period of 17 years, and it showed itself to be completely aware of the relatively small number of objectors who made competing claims as to the amounts they should have received in the final settlement.
>
> We find that the trial court had before it more than sufficient evidence upon which it could, as it did, conclude that the settlement was "fair and reasonable."
>
> We particularly note that, once all of the legal complications in the case had finally been disposed of, during the many trips of this case to the courts of appeals of this and the Fifth Circuit, the trial court demonstrated unusual skill in apprehending each nuance that was even suggested by the present objectors, the appellants here. We conclude that the final determination of the trial court, bolstered to some extent by the agreement, though without the signature, of the Equal Employment Opportunity Commission, cannot be faulted as having been an abuse of the trial court's discretion.[2]

721 F.2d at 316 (App. 38-39).

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[2]A district court's decision in approving a class action settlement "will be overturned only upon a *clear showing* of abuse of discretion." *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) (emphasis added); *Pettway* IV, 576 F.2d at 1214. The abuse of discretion standard is also applicable in reviewing the distribution of a settlement. *Holmes v. Continental Can Co., supra.*

Petitioners' petition for rehearing and rehearing *en banc* was denied on January 30, 1984. (App. 40-41).

REASONS FOR DENYING THE WRIT

Petitioners have failed to present any "special and important reason" for the issuance of a writ of certiorari. Sup. Ct. Rule 17. The decision by the court below is factually sound, based on sound legal principles, and is not in conflict with any decision of another federal court of appeals or any decision of this Court. The court below simply held that the district court did not abuse its discretion in approving the settlement, a decision which does not present any issue of substantial importance warranting consideration by this Court.

A. Since Petitioners' Argument that the Consent Decree is Defective Because it Failed to Contain an Opt-Out Provision for Dissatisfied Claimants Was Not Raised in the District Court, This Court Should Not Review the Issue.

Petitioners argue that the Court should issue a writ of certiorari because the Consent Decree entered herein does not contain an opt-out provision for dissatisfied class members. Presumably, petitioners contend that the district court abused its discretion by approving the settlement of this Rule 23 (b) (2) class action without providing an opportunity for class members to opt-out. The petitioners fail to state, however, that this issue was not raised in any form or fashion in the district court, and none of the petitioners sought to opt-out of the settlement.

In its Findings of Fact and Conclusions of Law, the district court discussed the right to opt-out even though the issue was not raised in the written objections to the Consent Decree or at the fairness hearing. The court stated:

In *Pettway* IV the Court of Appeals considered the question of opting out at some length. It concluded with a statement that "on remand if another settlement is reached, the district court should provide those claimants who decide to opt-out of the settlement with an opportunity to assert their individual claims in this action." *Id.* 576 F.2d at 1220. The attorney for the class brought this provision of the prior mandates to the attention of the class in his meetings with them in January, February, March and April of this year. It is undisputed that he informed class members in all of these meetings that he would assist them in seeking to opt-out of the settlement if they desired the opportunity to present their individual claims for greater back-pay. After formal notice to the class was mailed to each class member, the plaintiffs' attorney met individually with scores of class members in his office prior to the May 12, 1983 fairness hearing. In these meetings the opportunity to opt-out was once again explained to the class members, including many of the ones now objecting to the proposed settlement.[3] Presumably the attorneys for the objectors also read the mandate in *Pettway* IV and informed their clients of the opportunity to opt-out of the settlement and proceed individually with a claim for a greater back-pay award.

Despite the repeated notice to the class of the opportunity to opt-out of the settlement there has not been a single request to do so by any member of the class.[4] Instead, the objecting class members have apparently decided that the opportunity to opt-out is something that is not in their best interests. According to the papers before the Court and the testimony, this decision was made with the advice and counsel of the objectors' attorneys.

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[3]Counsel for petitioners herein admitted this at the fairness hearing. (Tr. 63).

[4]*Compare Holmes v. Continental Can Co.*, 706 F.2d 1144, 1151 (11th Cir. 1983) ("certain class members attempted repeatedly to opt out").

> The Court and the class representatives, of course, cannot force the objecting class members to seek the opportunity to opt-out of the settlement and pursue their individual claim of entitlement to more back-pay. The decision in *Pettway* IV only mentions the "opportunity" to opt-out of the settlement. In the circumstances now before the Court that opportunity has been provided and no class member has expressed any interest in it. *In the absence of any request to opt-out and any objection based on this ground, the Court concludes that the issue is moot.*

(App. 29-30) (emphasis added).

The petitioners did not attack this finding as clearly erroneous in the court below, nor have they attacked this finding as clearly erroneous in their petition to this Court. *See Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Moreover, since the opt-out issue was not raised in the district court, and for that reason not considered by the Eleventh Circuit, the issue should not be considered by this Court. *See Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977) ("Not having been raised in the District Court, that issue is not before us"). *See also Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) (since "the objectors did not mention [the issue] in either the written objections or at the fairness hearing . . . this Court will not consider the issue"); *United States v. Reiz*, 718 F.2d 1004, 1007 (11th Cir. 1983) ("issues not raised and preserved in the trial court will not be considered on appeal").[5]

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[5]Since the present settlement is a classwide settlement, and no class member opted out of the settlement, defendant's Motion to Require Subclass Members to Affirm or Reject Back Pay Settlement Awards, and in the Latter Event to Return the Awards to the Company, filed on May 20, 1981, is now moot. The district court so ruled at the fairness hearing. (Tr. 17). Accordingly, the statement on page 8 of the petition that the court took no action on this motion is inaccurate.

B. The Other Issues Raised by Petitioners Are Not Issues of Substantial Importance Warranting Consideration by this Court.

Another reason advanced by petitioners for granting the writ is that at the fairness hearing, the proponents of the settlement submitted affidavits from experts containing economic data to show that the settlement is fair, reasonable and adequate rather than producing live witnesses. The law is well settled, however, that the approval of a consent decree "requires a determination that the proposal represents a reasonable and factual determination based on the facts of record, whether established by evidence, *affidavit* or stipulation." *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (*en banc*) (emphasis added). *See also Weinberger v. Kendrick*, 698 F.2d 61, 69 & 71 (2d Cir. 1982) (affidavits submitted by proponents of settlement); *Williams v. City of New Orleans*, 543 F.Supp. 662, 673 (E.D. La. 1982), *rev'd on other grounds*, 694 F.2d 987 (5th Cir. 1983) (*en banc*) (same); *Miller v. Republic Nat. Life Ins. Co.*, 559 F.2d 426, 429 (5th Cir. 1977) (same); *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 620 (N.D. Cal. 1979) (same).[6]

Moreover, none of the objectors or their attorneys called Mr. Wiggins, class counsel, who was present at the fairness hearing for cross-examination, nor did they call defendant's expert who was also in Birmingham and available for cross-examination. (App. 13; 27). Nor did they call the named

[6]The petitioners' contention that Mr. Wiggins' affidavit is not a part of the record since it was never expressly ruled on is totally without merit. Mr. Wiggins' affidavit was in fact received in evidence at the fairness hearing since no objection was brought to the attention of the district court, (App. 27), and the court relied on it extensively in its Findings of Fact and Conclusions of Law entered on June 23, 1983 in support of his approval of the Consent Decree. In the absence of any specific objection, the petitioners waived their objection to the admissibility of the affidavit. *See* Rule 103, Fed.R. Evidence. *See also United States v. Morton*, 591 F.2d 483, 484 (8th Cir. 1979).

plaintiffs to the stand even though they were present at the fairness hearing. Finally, after testimony was concluded at the fairness hearing, the district court stated in detail some of the reasons why it considered the present settlement, fair, reasonable and adequate.[7] (Tr. 115-19). The district court adjourned the hearing without objections from either the objectors or their attorneys. None of the attorneys for the objectors nor any other class member indicated to the court in any way that they had other evidence to submit in support of their objections. Nor did they request a continuance of the fairness hearing to enable them to conduct discovery or gather other evidence.[8] (App. 25; 28). As the Eleventh Circuit stated "[w]e find that the trial court had before it more than sufficient evidence upon which it could, as it did, conclude that the settlement was fair and reasonable."[9]

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[7]Thereafter the district court entered detailed Findings of Fact and Conclusions of Law stating again why it found the settlement to be fair, reasonable and adequate and the objections without merit. (App. 3-35). As the Eleventh Circuit recognized, the trial court "showed itself to be completely aware of the relatively small number of objectors who made competing claims as to the amount they should have received in the final settlement . . ." and "demonstrated unusual skill in apprehending each nuance that was even suggested by the present objectors." 721 F.2d at 316 (App. 38).

Furthermore, the petitioners' contention that the district court placed the burden of proof on the objectors at the fairness hearing is simply not true and was rejected by the court below. As evidenced by the court's written Findings of Fact and Conclusions of Law, at all times in the proceedings in the district court, the burden of showing that the terms of the settlement were fair, reasonable and adequate was on the proponents. (App. 10; 13; 23; 27; 35).

[8]The statement on page 10 of the petition that certain computer printouts were not furnished by the proponents of the settlement to counsel for the objectors is patently false. Mr. Coleman admitted at the fairness hearing that Mr. Wiggins made available to him, prior to the hearing, a computer printout containing the calculations of plaintiffs' expert and other documents for Mr. Coleman to examine in preparation for the fairness hearing. (Tr. 64) (App. 12; 24).

[9]Thus, the statement on page 9 of the petition that the district court's findings of fact are not supported by evidence in the record is also without merit.

721 F.2d at 316 (App. 38). Under these circumstances, there can be no doubt that this issue does not present any question of substantial importance that merits consideration by this Court.

The petitioners also contend that the class representatives and the attorney for the class did not provide adequate representation of the interests of every member of the class. This contention was expressly rejected by the district court, (App. 16; 19; 35), and while argued extensively by petitioners in the court below, the Eleventh Circuit did not find that this finding of fact was clearly erroneous.[10] *See Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Accordingly, this purely factual issue does not present any question of substantial importance that merits consideration by the Court.

Finally, the petitioners contend there was something wrong with class counsel and the defendant's attorney working together in preparation for the fairness hearing after having negotiated for months over the terms of the settlement and in jointly preparing the documents in support of the settlement. Of course they worked together; they were the proponents of the settlement! The petitioners' argument fails to distinguish between conciliation and collusion. In any event, this contention by petitioners was also raised in the court below and rejected. Like the other issues raised by petitioners, this final issue does not present any special and important reason for the issuance of a writ of certiorari.

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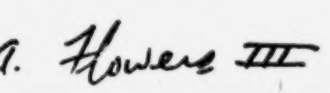
[10]Defendant-Respondent adopts the argument in plaintiffs-respondents' brief in opposition concerning the adequacy of representation by the named plaintiffs and class counsel and incorporates that argument herein by reference.

CONCLUSION

In this case, the Eleventh Circuit held that far from abusing its discretion, the district court proceeded with commendable care and fairness in approving a fair, reasonable and adequate settlement of this hotly contested, complex lawsuit. This case does not present any issue of substantial importance that merits consideration by this Court. This is purely an abuse of discretion case in which the Eleventh Circuit applied well established principles of law. Accordingly, the petition should be denied.

Respectfully submitted,



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PROOF OF SERVICE

I, F. A. Flowers, III, a member of the Bar of this Court, as counsel of record for respondent herein, American Cast Iron Pipe Company, hereby certify that three copies of the above and foregoing Brief in Opposition have been served by United States mail, postage prepaid and properly addressed upon Ralph E. Coleman, 2175 11th Court South, Birmingham, Alabama 35205; Ronald L. Spratt, Suite 3200, Smith Towers, 1929 Third Avenue North, Birmingham, Alabama 35203; Robert L. Wiggins, Jr., Suite 716, Brown-Marx Building, 2000 1st Avenue North, Birmingham, Alabama 35203; Bo Duplinsky, Office of General Counsel, Equal Employment Opportunity Commission, 2401 "E" Street, Washington, D.C. 20506; and the Solicitor General, Department of Justice, Washington, D.C. 20530 on this the 22nd day of May, 1984.

It is also certified that all parties required to be served have been served.

F. A. Flowers, III

F. A. Flowers, III

Sworn to and subscribed before
me this 22nd day of May, 1984.

Susan S. Turner

Notary Public